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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1977

ALYESKA PIPELINE SERVICE COMPANY,
Petitioner

v.

THE WILDERNESS SOCIETY, ENVIRONMENTAL DEFENSE FUND, INC., and FRIENDS OF THE EARTH,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 495 F.2d 1026 (1974). There is no opinion of the district court, as the attorneys' fees questions here presented were addressed to the court of appeals in the first instance.

An earlier opinion of the court of appeals (addressed to the merits of the case) is reported at 479 F.2d 842 (1973). This Court denied petitions for a

writ of certiorari to review that decision. 411 U.S. 917 (1973).

JURISDICTION

The judgment of the court of appeals was filed on April 4, 1974. The petition for a writ of certiorari was filed on July 3, 1974, and certiorari was granted on October 15, 1974. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether an attorneys' fee award can properly be made against a party which was not obdurate, cannot spread the costs to the beneficiaries of the litigation, and had no responsibility for enforcing the statutory provisions which were the basis of the litigation.

2. Whether attorneys' fees can be awarded under the "private attorney general" exception to the American rule barring recovery of attorneys' fees, in circumstances where (a) the statute on which the action is based does not reflect a strong congressional policy, (b) the award covers issues on which the attorneys do not prevail, and (c) there is no necessity for a fee award.

STATUTES INVOLVED

The decision of the court of appeals with respect to attorneys' fees was purportedly based on the equitable power of the courts and, accordingly, no statute is directly relevant. The provisions of the Mineral Leasing Act of 1920 and the National Environmental Policy Act of 1969 which were relevant to the decision on the merits are reprinted on pages 1a-3a, *infra*.

STATEMENT OF FACTS

In June of 1969 an application was filed with the Department of the Interior for the necessary authority to construct an oil pipeline across federal lands on a route between Prudhoe Bay on the northern coast of Alaska and Valdez on its southern coast. As modified by amended application in December 1969 the authority requested included a 54-foot permanent right-of-way, together with special permits for temporary use of additional land adjacent to the right-of-way. Also in 1969 the Department of the Interior initiated a detailed study of environmental consequences of the proposal (*see* pp. 38-39, *infra*).

On March 26, 1970 respondents, The Wilderness Society, Friends of the Earth and Environmental Defense Fund, Inc., filed an action in the United States District Court for the District of Columbia to prevent the Secretary of the Interior from issuing the requested authorizations. (R. 1A.)[1] The complaint named only the Secretary as a defendant. Petitioner Alyeska Pipeline Service Company ("Alyeska") and the State of Alaska sought and obtained leave to participate as intervenor-defendants approximately 18 months later. (R. 83, 84.)

Respondents' complaint stated two distinct claims: (1) that the Secretary lacked the power to grant a 54-foot permanent right-of-way together with special permits for the temporary use of adjacent public land because the total requested authority exceeded the 54-foot limitation on width of rights-of-way contained

[1] Citations to the record in The Wilderness Society v. Morton, C.A. No. 928-70 (D.D.C.), are denoted "R. —". Citations to the record in The Cordova District Fisheries Union v. Morton, C.A. 861-71 (D.D.C.) are denoted "C.R. —".

in Section 28 of the Mineral Leasing Act of 1920 (41 Stat. 449; 30 U.S.C. § 185 [1970]); and (2) that the Secretary had not yet completed the environmental study initiated the previous year and thus had not at that time satisfied the requirements of the recently-enacted National Environmental Policy Act of 1969 (83 Stat. 852; 42 U.S.C. § 4321 *et seq.*) (hereinafter "NEPA").

On April 23, 1970, the district court entered a preliminary injunction against the Secretary. (R. 26.) This injunction remained in effect for over two years while the Department of the Interior completed its exhaustive analysis of the environmental impact of the proposed pipeline. Steps taken by the Department are more fully described in the briefs in the court below and are summarized on pp. 38-39, *infra*. Both Alyeska and the respondents submitted information to the Department (as did many other public and private organizations) which was considered during the course of its evaluation. Respondents' principal position was that the Department should reject the trans-Alaska route proposed by Alyeska and adopt an alternative pipeline route across Canada which respondents believed to be preferable for environmental reasons.

The Department's environmental analysis culminated in the publication of a six-volume environmental impact statement (R. 239), accompanied by a three-volume analysis of economic and national security impacts (R. 239), and in an announcement by the Secretary of the Interior on May 11, 1972, that he had decided to issue the authority necessary for construction of the pipeline along the route proposed by Alyeska (A. 105).

Proceedings in the district court, which had been essentially dormant, were then reactivated.[2] On May 12, 1972 respondents moved for partial summary judgment on the Mineral Leasing Act issues. (A. 139.) On motion of the defendants (A. 140, 153), the district court deferred consideration of the summary judgment motion on the ground that all of the issues should be considered together. (R. 184.) On the NEPA issues, respondents argued primarily that the Secretary failed to give adequate consideration to the alternative pipeline route across Canada. Following briefing and a plenary hearing, on August 16, 1972 the district judge vacated the preliminary injunction which he had issued in April 1970, ruled in favor of defendants on all issues, and dismissed the complaint.

An expedited appeal to the Court of Appeals for the District of Columbia Circuit ensued. That court, sitting *en banc*, ruled that Section 28 of the Mineral Leasing Act barred the Secretary from issuing to Alyeska the special land use permit for temporary use, incident to construction, of lands adjoining the 54-foot permanent right-of-way for the pipeline. 479 F.2d 842 (1973). By a vote of 4 to 3, the court declined to decide respondents' claim that the Secretary had not complied with NEPA. *Id.* at 889. The three dissenting judges considered the NEPA issues and concluded that all NEPA requirements had been met. It was also their view that the court of appeals had an obli-

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[2] On April 28, 1971 a second complaint had been filed: The Cordova District Fisheries Union v. Morton, C.A. No. 861-71 (D.D.C.) (C.R. 3). This action was consolidated with Wilderness Society v. Morton by order of the district court (May 11, 1972) (C.R. 60) and was decided at the same time. A request for attorneys' fees was also filed in the *Cordova* case, but was denied by the court of appeals and is not before this Court.

gation to decide the NEPA issues. *Id.* at 905, 912. This Court denied certiorari. 411 U.S. 917 (1973).

Almost immediately after this Court's action, Congress took steps to nullify the results of the court of appeals' decision. On November 16, 1973 amendments to the Mineral Leasing Act were enacted which gave the Secretary express authority to issue all of the permits in question. The Act also *directed* the Secretary to issue the permits and take all other steps necessary for construction of the pipeline; and it specifically provided that no further action under NEPA would be required. Finally, Congress included a provision prohibiting (except for Constitutional questions) further judicial review of government actions in connection with the pipeline. P.L. 93-153, 87 Stat. 577 *et seq.* (November 16, 1973).[3]

While Congress was considering legislation to eliminate the impasse created by the court of appeals' decision, respondents filed a bill of costs with the court of appeals. Respondents alleged that it was appropriate to file their bill of costs in the court of appeals because the district court had "acted merely as a conduit. . . ." Respondents requested an award of expenses and compensation for 4455 hours of attorney time in connection with both the court proceedings and respondents' submission to the Department of Interior of comments on the impact statement. Attorneys' fees were sought only as to Alyeska, although the more customary "costs" were sought from the United States and from the State of Alaska.

[3] The validity of the prohibition on judicial review was before this Court on direct appeal in Bud Brown Enterprises, Inc. v. Morton, *motion to affirm granted*, 43 U.S.L.W. 3206 (Oct. 9, 1974).

Following briefs and oral argument, the court of appeals, again sitting *en banc*, decided by a vote of 4 to 3 that an award of attorneys' fees against Alyeska alone was appropriate and remanded the case to the district court to determine the amount of the attorneys' fees. 495 F.2d 1026 (1974).

The majority recognized that there is a general rule against awarding attorneys' fees and that neither of the exceptions which have been approved by this Court would justify an attorneys' fees award. *Id.* at 1029. However, the majority found that respondents had acted in the public interest by prosecuting the suit and that, as a result, it was appropriate to award fees based on a "private attorney general" rationale. *Id.* at 1035-36. The majority expressly stated that it was breaking new ground, ruling "for the first time today" that a fee award "was proper on behalf of 'private attorney general' litigants in environmental suits successfully prosecuted in the public interest." *Id.* at 1038 n. 9. The court counted it "a happy result of our decision" that the decision "may increase the willingness of skilled lawyers throughout the nation to undertake public interest litigation on behalf of unmonied clients with just, lawful, and important claims." *Id.*

In finding that an award was proper under the private attorney general exception, the court abandoned the requirement imposed in previous cases utilizing the exception that the statutory duty involved must reflect a strong congressional policy. The majority also extended the award of attorneys' fees to work on all issues in the case (including work related to the administrative process), even though respondents failed to prevail on the NEPA issues. *Id.* at 1034. And the majority ruled that respondents' at-

torneys could be awarded the "reasonable value" of services rendered, even though such "value" might substantially exceed the amounts paid by the respondents to their attorneys. *Id.* at 1036.

As to allocation among the defendants, the court of appeals decided that it would be "inappropriate" to tax attorneys' fees against the State of Alaska (*id.* at 1036 n.8),[4] but appropriate to assess attorneys' fees equally against the United States and the private party intervenor, Alyeska. *Id.* at 1036. However, recovery against the United States was barred by 28 U.S.C. § 2412, so the burden of paying attorneys' fees fell solely upon the private party intervenor, to the extent of 50 percent of the award.

Three dissenting judges strongly disagreed. They said: that passage by Congress of the "Trans-Alaska Pipeline Authorization Act" (P.L. 93-153) made it clear respondents were acting *against* the public interest, not in furtherance of it (495 F.2d at 1042); and that the majority decision, which permits recovery for issues upon which respondents did not prevail and which permits recovery in excess of the amounts actually paid or owed to counsel, is a "dangerous precedent" which may "be just the stimulus needed to launch . . . in the direction of the courthouse" other potential plaintiffs who have differing views as to where the "public interest" lies, thereby giving "new impetus" to the "flood of 'public interest' litigation, particularly in the environmental field. . . ." *Id.* at 1043. In addition, one judge pointed out that

[4] The majority based this conclusion on the fact that Alaska also presented "public interest implications" of the pipeline. The majority, however, concluded that *expenses* "should be divided equally among Alyeska, the State of Alaska, and the United States." *Id.* at 1028.

Alyeska should not "be held answerable for what the majority apparently perceives to be the sins of the Government" and that the real premise of the opinion is: "oil companies are prosperous, appellants are poor, and therefore oil companies should finance both sides of this litigation." *Id.* at 1042.

This Court granted Alyeska's petition for a writ of certiorari on October 15, 1974.

SUMMARY OF ARGUMENT

Whether or not this Court approves of the "private attorney general" exception to the traditional American doctrine barring award of attorneys' fees, consideration of that doctrine is unnecessary to dispose of this case, because Alyeska is not an appropriate party against whom an award can be made. It is conceded by the court of appeals that neither of the two nonstatutory exceptions to the nonaward doctrine —the "obdurate behavior" and the "common fund or common benefit" exceptions—justifies an award against Alyeska.

In this litigation, respondents sought to enforce certain statutes bearing on the duties of the Secretary of the Interior. As the court of appeals recognized in its earlier opinion on the merits, neither of these statutes imposed any responsibilities on Alyeska. Under these circumstances, it is inequitable to impose attorneys' fees on Alyeska. Award of attorneys' fees against a party is not proper merely because the party participated in the litigation, but must be based upon responsibility for noncompliance with statutory duties imposed upon the party. Alyeska clearly had no such responsibility, and could control neither the Secretary's interpretation of the Mineral Leasing Act

width provision nor the adequacy of the Department's compliance with NEPA. As the Fifth Circuit has recently concluded, private parties should not be made to pay for actions of federal officials which they have neither controlled nor improperly influenced. Because Congress has by statute precluded an award against the federal officials whose duty was in issue does not justify violating this principle. In such cases, provisions for award of attorneys' fees must come, if at all, from Congress.

As to the application of a "private attorney general" exception, no such nonstatutory exception has ever been embraced by this Court. But even if such an exception were to be adopted, no basis for an award would exist here because the requirements of such an exception are not met.

The first requirement for application of a private attorney general exception is that the statute involved in the litigation reflect a policy considered by Congress to be of the highest priority. That requirement cannot be met here because the Mineral Leasing Act width provision, as to which respondents prevailed in part, did not reflect such a congressional priority. The prompt amendment by Congress of the provision in question demonstrates the lack of congressional commitment to the previous provision. Furthermore, the fact that the width limitation in question was never mentioned in congressional committee reports leading to the enactment of the limitation plainly demonstrates that the enacting congress did not view it as a matter of special priority.

In abandoning the congressional priority requirement, the court of appeals created an exception to the nonaward rule which either (1) justifies awards for

all federal statutes governing the duties of federal officials, or (2) requires a judicial selection, for which no ascertainable standards exist, of qualifying statutes. The former invites wholesale applications for attorneys' fees and provides a further stimulus to litigation in the federal courts; the latter would provoke endless litigation over the scope of the exception, while at the same time involving the courts in a form of legislative judgment unsuited for judicial determination.

The second requirement of the private attorney general doctrine is that awards go only to successful litigants. Respondents plainly did not prevail on any NEPA issues. These issues were left undecided by the court of appeals, and the three judges who expressed a view on them would have ruled against respondents. Success is the only objective indication that a statutory policy has been vindicated. To abandon the success requirement will involve the courts in speculation as to whether beneficial results might have occurred without the unsuccessful suit, or whether the goals pursued in litigation would be beneficial.

Judicial assessments of public benefit are no adequate substitute for objective success. The difficulties of such assessments are reflected by the strongly conflicting views of the closely-divided court of appeals concerning the nature of respondents' contributions. And Congress' prompt legislative mandate to proceed with the pipeline shows an assessment at odds with that of the majority of the court of appeals.

Even if the unsuccessful respondents could qualify for an award by demonstrating a public benefit, the existence of a benefit attributable to them cannot be assumed, as the court of appeals did, but requires

supplementary proceedings. The substantial environmental efforts by the Secretary before NEPA was enacted, and the evidence that post-NEPA efforts were stimulated by genuine environmental concern as well as by many judicial interpretations of NEPA in other cases, undermine respondents' claim of credit for any beneficial results of Interior's efforts.

The third requirement of the private attorney general doctrine is that of necessity. It is not met here because respondent organizations are financially supported by their substantial membership for the purpose of bringing environmental suits. Such organizations themselves thus provide a means of allocating the cost of environmental suits broadly among those who perceive such litigation to be beneficial. The vast number of environmental suits since 1969, including a number in which respondent organizations participated, demonstrates that no further incentive to the proliferation of such suits is required.

ARGUMENT

I. ALYESKA IS NOT AN APPROPRIATE PARTY AGAINST WHICH AN AWARD OF ATTORNEYS' FEES CAN BE MADE

A. Neither Of The Exceptions To The Rule Barring Recovery Of Attorneys' Fees Which Have Been Recognized By This Court Justifies An Award Against Alyeska

This Court has consistently followed, and has recently reaffirmed, the traditional American rule that attorneys' fees "are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor." *F. D. Rich Co.* v. *United States*, 94 S. Ct. 2157, 2163 (1974).[5] The rule reflects a sound judicial

[5] *See also* Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717 (1963); Forest Laboratories, Inc. v. Pillsbury Co., 452 F.2d 621, 638 (7th Cir. 1971); Hohensee v. Basalyga, 50 F.R.D. 230, 232 (M.D. Pa. 1969), *aff'd*, 429 F.2d 982 (3rd Cir. 1970); Monolith Portland Midwest Co. v. Kaiser Aluminum & Chemical Corp., 407 F.2d 288, 293 (9th Cir. 1969); Fleischer v. Paramount Pictures Corp., 329 F.2d 424, 426 (2d Cir.), *cert denied*, 379 U.S. 835 (1964).

aversion to penalizing good faith litigation. It recognizes that courts would be making judgments which are inherently legislative in nature if they award attorneys' fees to promote the congressional purpose underlying a specific statute when Congress has not provided for such award.[6]

Two carefully circumscribed exceptions to the doctrine have been recognized by this Court; both are designed to achieve particular equitable objectives. *F. D. Rich Co., supra* at 2165. The first exception relates to obdurate behavior by a party to litigation. It authorizes an award under the court's "equitable powers to impose costs on defendants who behaved in bad faith" (*La Raza Unida* v. *Volpe*, 57 F.R.D. 94, 96 (N.D. Cal. 1972)), and is applied to oppressive or vexatious conduct by a litigant. *See, e.g., Vaughan* v. *Atkinson*, 369 U.S. 527 (1962).

In this case the court of appeals expressly recognized that there was no conduct by any of the de-

[6] Where Congress has desired to provide for fee awards, it has carved out specific statutory exceptions to the general American rule. *See, e.g.*, Clayton Act, 15 U.S.C. § 15 (1970) Communications Act of 1934, 47 U.S.C. § 206 (1970); Packers and Stockyards Act, 7 U.S.C. § 210(f) (1970); Perishable Agriculturable Commodities Act, 7 U.S.C. § 499g(b) (1970); Railway Labor Act, 45 U.S.C. § 153(p) (1970); Interstate Commerce Act, 49 U.S.C. § 16(2) (1970). Often these statutory exceptions are explicitly limited to instances where bad faith or wrongful intent justify a fee award. *See* Securities Act of 1933, 15 U.S.C. § 77k(e) (1970); Servicemen's Readjustment Act, 38 U.S.C. § 1822(b) (1970); Trust Indenture Act, 15 U.S.C. § 77www(a) (1970).

fendants which would invoke the obdurate behavior exception:

> Appellees' legal position as to the meaning of the Mineral Leasing Act and relevant administrative regulations, though ultimately rejected by the court, was manifestly reasonable and assumed in good faith, particularly in view of the long administrative practice supporting it. [495 F.2d at 1029.]

The second exception is known as the "common benefit" exception. It was initially developed to prevent unjust enrichment where the attorneys' efforts for which a fee award is claimed have produced a "common fund" of benefit to a class, and an award of fees operates to shift the burden of litigation equitably to all the beneficiaries of the fund. *See, e.g., Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939). Subsequently, the exception was expanded to cover situations in which no actual fund was produced, but the "successful litigant has conferred a substantial benefit on a class of persons and the court's shifting of fees operates to spread the cost [of litigation] proportionately among members of the benefitted class." *F. D. Rich Co., supra* at 2165. "It shifts to the beneficiaries those costs that they would have incurred had they brought and prosecuted the suit." *Sierra Club* v. *Lynn*, — F.2d — (5th Cir., Oct. 4, 1974) (opinion reprinted *infra* at 4a). This broader conception of the common benefit doctrine applies, for example, where the imposition of fees upon a corporation in a shareholders' derivative action, or upon a union in a suit to enforce union membership rights, provides a natural and efficient mechanism for

imposing upon all of the shareholders or union members the costs of an action which benefits them all.[7]

In the present litigation, if a benefit had been produced, an award against the United States (had it not been barred by 28 U.S.C. § 2412)[8] would have operated to spread the benefit among all citizens. Similarly, an award against the State of Alaska would have spread the claimed benefits at least among the residents of a state which expects to receive special economic benefit from the pipeline.[9]

But the "common benefit" exception has no application to Alyeska. As the court of appeals noted, the beneficiaries of the litigation (assuming that such benefit exists) are citizens at large, and "imposing attorney's fees on Alyeska will not operate to spread the cost of the litigation proportionately among the beneficiaries, the key requirement of the common benefit theory." *Id.* at 1024. Inapplicability of the common benefit exception in similar circumstances

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[7] *See* Hall v. Cole, 412 U.S. 1 (1973); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970); Yablonski v. United Mine Workers of America, 466 F.2d 424 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 918 (1973); and Bakery & Confectionery Workers Int'l Union v. Ratner, 335 F.2d 691 (D.C. Cir. 1964).

[8] "Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action." 28 U.S.C. § 2412.

[9] Respondents sought no award against the State, and the court of appeals blandly asserted that such an award would "undermine rather than further the goal of ensuring adequate spokesmen for public interests." 495 F.2d at 1036 n.8.

was recently recognized by the Fifth Circuit in *Sierra Club* v. *Lynn* (*see infra* at 45a).[10]

B. The Legal Duty Which Respondents Sought To Enforce Was That Of The Interior Department

This lawsuit was based on two statutory provisions: Section 28 of the Mineral Leasing Act of 1920, 30 U.S.C. § 185, which governed the width of rights-of-way for oil pipelines across federal lands managed by the Department of the Interior, and the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.*, which states the obligations of federal agencies with respect to the consideration of environmental values and the preparation of environmental impact statements prior to taking "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332.

Each of these provisions imposes limitations on the authority of, or imposes a duty upon, federal officials and agencies. Neither imposes any duty of compliance on a private party seeking favorable agency action.

With respect to the Mineral Leasing Act, authority to grant the requested permanent right-of-way and temporary use of land contiguous to the right-of-way depended upon interpretation by the Department of the Interior of laws entrusted to its administration.[11]

[10] *See also* Harrisburg Coalition Against Ruining the Environment, No. 71-143 Civil (M.D. Pa., July 12, 1974).

[11] For many years, the Department of the Interior had regulations permitting the use of so-called "special land use permits", a form of revocable license to use federal lands, for various purposes not specificaly authorized by statute. *See, e.g.*, 43 C.F.R. Part 2920 (1970). Such revocable permits had on occasion, prior to the application relating to the Alaska pipeline, been utilized to provide additional space for construction purposes in connection with grants of pipeline rights-of-way across public lands pursuant to 30 U.S.C. § 185 (cited on pp. 40-44 of Alyeska's brief on Mineral Leasing Act issues in the courts below, A. 166-170). Similar uses of federal lands had been recognized by a line of opinions of the Attorney General. *E.g.*, 35 Op. Att'y Gen. 485 (1928); 30 Op. Att'y Gen. 470 (1915); 22 Op. Att'y Gen. 240, 303, 544 (1898); 19 Op. Atty's Gen. 628 (1890); 16 Op. Att'y Gen. 152, 206 (1878).

Thus Alyeska could obtain the permits it sought only upon favorable action on its requests by appropriate Interior officials.

With respect to the National Environmental Policy Act, that statute imposes a duty upon all federal officials to consider fully the environmental impact of any proposed major federal action. 42 U.S.C. § 4332 (2)(C). Decisions of the lower federal courts describe in detail the nature and scope of this obligation upon federal officials.[12] It has been firmly established that the duty of such officials under the Act is not delegable to an applicant, but must be performed by the federal officials. *See Greene County Planning Board* v. *FPC*, 455 F.2d 412, 420 (2d Cir.) *cert. denied*, 409 U.S. 849 (1972). The essentially governmental nature of this responsibility, and the discharge of that responsibility by the Secretary of the Interior, are clearly demonstrated by the facts in this case, which evidence an unprecedented and continuing effort by the Department (both before and after the passage of NEPA) to consider fully all environmental implications of the proposal.[13]

The fact that the legal authority and duties which are involved in this case were vested exclusively in

[12] *See, e.g.*, Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971); NRDC v. Morton, 458 F.2d 827 (D.C. Cir. 1972); Environmental Defense Fund v. Froehlke, 473 F.2d 346 (8th Cir. 1972).

[13] This history is described on pp. 6-37 of Alyeska's brief on NEPA issues in the court below (A. 178-209).

the Department of the Interior was recognized in both opinions of the court of appeals. In its decision on the merits, the court stated:

> Appellants contend that *issuance* of certain rights-of-way and special land use permits *by the Secretary of Interior* to Alyeska and to the State of Alaska would violate Section 28 of the Mineral Leasing Act of 1920, 30 U.S.C. § 185 (1970), by exceeding the width limitation of that section. They argue, too, that the permit issued by the *Forest Supervisor* violates 16 U.S.C. §§ 497 and 497a (1970) by exceeding the 80 acre limitation of those sections. Finally, appellants contend that issuance of any permits or rights-of-way necessary for construction of the trans Alaska pipeline violates the National Environmental Policy Act of 1969, 42 U.S.C. § 4321, et seq. (1970) (hereinafter NEPA). In general they claim that *Interior has not prepared an adequate environmental impact statement.* [479 F.2d at 846 (emphasis added.]

Similarly, in its decision regarding the award of attorneys' fees, the majority of the court of appeals found that "it is the Interior Department [action], on Alyeska's application, which violated the Mineral Leasing Act by granting rights-of-way in excess of the Act's width restrictions, and it is the Interior Department's failure to comply with NEPA which was challenged on appeal." 495 F.2d at 1036.

C. The Burden Of A Fee Award May Not Be Shifted To A Private Party Which Violated No Law And Had No Legal Duty

As explained above, it appears to be beyond dispute that in this case Alyeska (1) was not guilty of any improper conduct, (2) is not in position to shift a fee award to the "beneficiaries," and (3) had no

responsibility under the statutes which respondents sought to enforce. In these circumstances, an award against Alyeska is highly inequitable. The only justification advanced by the court of appeals for this aspect of its decision is the following brief statement:

> Fee shifting under the private attorney general theory, however, is not intended to punish law violators, but rather to ensure that those who have acted to protect the public interest will not be forced to shoulder the entire cost of litigation. *Cf. Hall* v. *Cole, supra*, 412 U.S. at 14. After successfully persuading the Interior Department to grant the rights-of-way, Alyeska intervened in this litigation to protect its massive interests. Since Alyeska unquestionably was a major and real party at interest in this case, actively participating in the litigation along with the Government, we think it fair that it should bear part of the attorneys' fees. *Cf. Silva* v. *Romney*, 1 Cir., 473 F.2d 287 (1973). [495 F.2d at 1036.][14]

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[14] Recognizing that a fee award against Alyeska could not be based on any exception which has been approved by this Court, the court of appeals sought to justify its award under the "private attorney general" doctrine. The substantive requirements of that doctrine will be analyzed in the next section of this brief. However, consideration of the circumstances, if any, in which the application of such doctrine would be proper is not necessary to the decision in this case, since fees have been taxed here against an inappropriate party; we are not aware of any case (other than Sierra Club v. Lynn, 364 F. Supp. 834 (W.D. Tex. 1973)) in which the private attorney general doctrine has ever been used to permit awards against parties without responsibility with respect to the legal violation. Sierra Club v. Lynn was reversed by the Fifth Circuit on October 4, 1974. *See infra* at 21.

Neither of the cases cited by the court supports its proposition. In Hall v. Cole, the private attorney general claim was specifically reserved for future decision. 412 U.S. at 5 n. 7 (1973). The Court decided the case on a benefit rationale, holding that "reimbursement of respondent's attorneys' fees out of the union treasury simply shifts the costs of litigation to 'the class that has benefited

This explanation was sharply criticized by Judge MacKinnon:

> Brevity is not always to be desired—especially on the pivotal issue of whether Alyeska should be held answerable for what the majority apparently perceives to be the sins of the Government. Perhaps this brevity, so admirable in other contexts, is attributable to an inability to marshal cogent arguments to support the proposition advanced; more likely, however, such brevity is required to mask sub silentio the majority premise of the opinion. That is, oil companies are prosperous, appellants are poor, and therefore oil companies should finance both sides of this litigation. [495 F.2d at 1042.]

The majority's offhanded disposition of the key issue in the case misconceives the principle which is involved. It is not the fact of participation in litigation by one who has a financial stake in the outcome which should be the measure of an obligation to pay attorneys' fees. Rather, it is the question of who has the responsibility for the action which is at issue.

In this case, such responsibility is vested solely in a federal official. It was the Secretary of the Interior, and only the Secretary, whose actions, and whose statutory duty, were in question. Alyeska participated in the evaluation effort only to the extent of submitting information requested by the Department.

from them and that would have had to pay them had it brought the suit'." *Id.* at 8-9. In Silva v. Romney, 473 F.2d 287 (1 Cir. 1973), the court declared that a district court had the authority to enjoin private parties from proceeding with environmentally damaging actions pending completion of an impact statement by the government. The case did not concern the proposition that a private party can be held responsible for violations of law committed by the government.

Alyeska was not privy to the development of the final environmental statement and had no control over the scope or content of that statement, the choice of supporting data or the conclusions reached. Alyeska did not participate in the consultations between Secretary Morton and other federal officials which preceded his final decision.

As to the litigation, it must be pointed out that the complaint was filed solely against the Secretary of the Interior and, until Alyeska and the State of Alaska intervened 18 months later, he was the only defendant. After Alyeska and Alaska intervened, the Government continued to play its primary role in the litigation as counsel for the Secretary. There is no evidence whatsoever that Alyeska controlled the Government's actions and the court of appeals made no such finding.

Moreover, participation by other parties in litigation involving the acts of a government official cannot alter the nature of the governmental responsibility, or provide a basis for shifting to private parties the burden of compensating those claiming to be aggrieved by government action. Whatever the scope of justifiable awards under a private attorney general rationale, private parties should not be made to pay for actions of federal officials which they have neither controlled nor improperly influenced.

In its recent decision in *Sierra Club* v. *Lynn* (reprinted *infra* at 4a) the Court of Appeals for the Fifth Circuit flatly rejected the decision of the majority here and refused to follow it. The analysis of the Fifth Circuit is sound and should be approved by this Court. In that case, the district court had awarded attorneys' fees against a private defendant in an action challenging the adequacy of an environ-

mental impact statement prepared by the Department of Housing and Urban Development. The Fifth Circuit noted that the facts were "almost identical to The Wilderness Society v. Morton" where, as the court put it, "attorneys' fees were assessed against Alyeska Pipeline Service Company, the private applicant under the Mineral Leasing Act, despite the fact that it was the Interior Department which had violated the Act and failed to comply with NEPA." *Infra* at 45a-46a. The Fifth Circuit concluded that an award of attorneys' fees under such circumstances "would be inequitable," saying:

> We decline to follow the *Wilderness Society*. This Circuit has never assessed attorneys' fees against a party innocent of any wrongdoing. In the absence of proof that the private party controlled the government agency's action or caused its default, it cannot be cast in judgment as a result of the agency's shortcomings. [*Infra* at 46a.]

The same conclusion was reached by a district court which was asked to award attorneys' fees against a state when a federal agency had been charged with violating NEPA obligations. *Committee to Stop Route 7 v. Volpe*, 4 ERC 1681 (D. Conn. 1972). Noting that the default involved was that of a federal agency, the district court concluded that "it would not be appropriate to impose attorneys' fees as a cost upon the state, when the federal agency made the erroneous decision which led to the plaintiffs' judgment." *Id.* at 1682.[15]

[15] *See also* Harper v. Mayor and City Council, 359 F. Supp. 1187 (D. Md.), *modified*, 486 F.2d 1134 (4th Cir. 1973), where the court refused to award attorneys' fees against an intervenor who did not have the ability to influence the action in question.

In this case, the court of appeals imposed attorneys' fees against a non-responsible party where Congress had specifically precluded an award against the responsible party. If, as Congress directed, no fees are to be awarded under the statute against the responsible party, *a fortiori*, they are not to be awarded against a non-responsible party in the absence of a specific congressional direction. As the Fifth Circuit stated in the *Sierra Club* case:

> The fact that the breach of duty involved was committed by one who is immune from liability for financial redress affords no basis for shifting fees.
>
> . . . .
>
> The result of governmental immunity in this case is to require plaintiffs to absorb their own legal expenses. Another solution must come from Congress rather than in whole or half from the pocket of an innocent party. [*Infra* at 46a-47a.]

II. THE CIRCUMSTANCES OF THIS CASE CANNOT JUSTIFY AN AWARD OF ATTORNEYS' FEES UNDER A PRIVATE ATTORNEY GENERAL THEORY

A. The Private Attorney General Exception, Which Has Not Been Approved By This Court, Is Properly Applied Only In Certain Limited Circumstances

The "private attorney general" concept is generally traced to *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968). The case involved Title II of the Civil Rights Act of 1964 (*see* 42 U.S.C. § 2000a-3(b)), which expressly authorized awards of attorneys' fees, but left such awards to the discretion of the court. This Court held that attorneys' fees should ordinarily be recovered in successful actions brought under Title II. In so ruling, the Court observed that a successful plaintiff under Title II obtains an injunction "not for himself alone, but also as a private attorney

general, vindicating a policy that Congress considered of the highest priority." 390 U.S. at 402.

In some recent decisions, lower federal courts have extended the private attorney general rationale to grant fees without statutory authorization. Such decisions have been limited almost exclusively to civil rights and reapportionment cases—*i.e.*, lawsuits brought to protect fundamental rights expressed in the Constitution and in civil rights legislation.[16] Except for the district court decision in *Sierra Club* v. *Lynn*, which was reversed on appeal (*see infra* at 4a), they have involved situations where three elements emphasized in *Piggie Park* were all present: (1) "a policy Congress considered of the highest priority,"[17] (2) a successful party, and (3) a statutory scheme requiring private enforcement. 390 U.S. at 401-402. Further, as the Court of Appeals for the

[16] *See, e.g.*, Sims v. Amos, 340 F.Supp. 691 (M.D. Ala. 1972); Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971). The cases are collected in Comment, *Court Awarded Attorneys' Fees and Equal Access to the Courts*, 122 U. Pa. L. Rev. 636, 666-68 (1974). As the court stated in Wright v. Southeast Alabama Gas District, 376 F.Supp. 780, 783 (M.D. Ala. 1974): "While virtually every law establishing a remedy may be said to declare a public policy, the courts have confined their awards-of-fees-to-encourage-litigation policy to violations of civil rights acts . . . ." Prior to the instant case, the only extensions of the exception beyond civil rights and constitutional cases appear to be three district court decisions: Sierra Club v. Lynn, 364 F.Supp. 834 (W.D. Texas 1973) (NEPA), *rev'd*, — F.2d — (5th Cir. 1974) (*see infra* at 4a); Calnetics Corp v. Volkswagen of America, Inc., 353 F.Supp. 1219 (C.D. Cal. 1973) (antitrust); and La Raza Unida v. Volpe, 57 F.R.D. 94, 98 (N.D. Cal. 1972) (housing relocation).

[17] "It is particularly in the area of desegregation that this Court . . . recognized that, by their suit, plaintiffs vindicated a national policy of high priority." Bradley v. School Board of the City of Richmond, 94 S. Ct. 2006, 2020 n.27 (1974) (hereafter referred to as "Bradley v. School Board").

Fourth Circuit pointed out,[18] most decisions endorsing the private attorney general exception have first found that one of the recognized exceptions (obdurate behavior or common benefit) is applicable and then added the private attorney general rationale as an alternative ground. Indeed, the private attorney general rationale has generally been applied so as to constitute an expansion of the common benefit exception, with awards usually being made against a public body which has "the ability to spread or shift the attorneys' fees to those actually benefited or to the public at large." *Gilpin* v. *Kansas State High School Activities Ass'n, Inc.*, 377 F.Supp. 1233, 1250 (D. Kan. 1973).[19]

This Court has not yet had occasion to rule on such extension, though the issue has been raised in four cases previously before the Court.[20] As the Court recently stated:

> This "private attorney general" rationale has not been squarely before this Court . . . ; nor do we intend to imply any view either on the validity

[18] Bradley v. School Board, 472 F.2d 318, 331 n.56 (1972) *rev'd on other grounds*, 94 S. Ct. 2006 (1974).

[19] The *only* environmental cases involving the private attorney general theory have involved such cost spreading. *See* National Resources Defense Council v. EPA, 484 F.2d 1331, 1334 (1st Cir. 1973): "To allocate petitioners' reasonable costs and attorneys' fees to [the Environmental Protection Agency] is to spread them ultimately among the taxpaying public, which receives the benefits of this litigation." *See also* La Raza Unida v. Volpe, 57 F.R.D. 94, 101 (N.D. Cal. 1972); Harrisburg Coalition Against Ruining the Environment v. Volpe, No. 71-143 Civil (M.D. Pa., July 12, 1974).

[20] *See* Bradley v. School Board, *supra;* F. D. Rich Co. v. United States, *supra;* Hall v. Cole, 412 U.S. 1, 6 n.7 (1973); Northcross v. Board of Education of the Memphis City Schools, 412 U.S. 427, 429 n.2 (1973).

or scope of that doctrine. [*F. D. Rich Co.* v. *United States, supra,* 94 S. Ct. at 2165.]

Nonetheless, the court of appeals majority rested its award of fees solely upon its concept of a private attorney general exception, saying:

> Whether we consider the Mineral Leasing Act and administrative regulation issues upon which the court rested its opinion declaring the pipeline unlawful, or the National Environmental Policy Act (NEPA) issues which the court left undecided, appellants succeeded in their role as private attorneys general protecting vital statutory interests. [495 F.2d at 1032.]

The court recognized that it was breaking new ground:

> In July of 1971 [the date the suit was filed] no circuit had yet ruled that such an award was proper on behalf of "private attorney general" litigants in environmental suits successfully prosecuted in the public interest. Our circuit so rules for the first time today—in a 4 to 3 opinion. [*Id.* at 1038 n.9.]

As the preceding argument demonstrated, Alyeska is not a party against which fees can justifiably be awarded. However, wholly apart from the question of whether Alyeska was an appropriate party for the assessment of fees, we submit that no award against *any* party can be justified under the facts here, as this is not a proper case for application of the private attorney general exception. The court of appeals went substantially beyond prior decisions of other lower courts by ruling that the private attorney general doctrine could be invoked in circumstances where: (a) the statutory duty which plaintiffs seek to enforce does not reflect a strong congressional policy; (b) the award covers issues on which plaintiffs do not

prevail; and (c) the award is made even where there is no necessity for it.

B. The Mineral Leasing Act Was Not A Statute Reflecting A Strong Congressional Policy Justifying An Exception To The Nonaward Rule

As explained above, other decisions of lower courts applying a private attorney general exception have involved vindication of a policy which Congress considered " of the highest priority." Most have involved civil rights legislation [21] or constitutional issues. (*See* n. 16 *supra.*) Courts which have used the exception have also observed that federal courts have no license to award fees "as remedies to enforce all statutes." *Lee* v. *Southern Home Sites Corp.,* 444 F.2d 143, 145 (5th Cir. 1971); *La Raza Unida* v. *Volpe,* 57 F.R.D. 94, 99 (N.D. Cal. 1972).

In such cases as *Lee, supra, NAACP* v. *Allen,* 340 F. Supp. 703, 709 (M.D. Ala. 1972), and *Sims* v. *Amos,* 340 F. Supp. 691, 694 (M.D. Ala. 1972), fee awards were made only after a careful examination of the statute involved and a finding that such statute embodied a compelling or strong congressional policy. Similar analyses to find particular and unusual congressional interests have been made in many other cases.[22]

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[21] Commentators have defended the uniqueness of the civil rights laws compared to the thousands of competing statutory schemes and have noted that the private attorney general doctrine could be applied in civil rights cases without undermining the general nonaward doctrine. *See* Falcon, *Award of Attorneys' Fees in Civil Rights and Constitutional Litigation,* 33 Md. L. Rev. 329, 414 (1973).

[22] *See, e.g.,* Gilpin v. Kansas State High School Activities Ass'n, Inc., *supra,* 377 F.Supp. at 1250-51; Wallace v. House, 377 F.Supp. 1192, 1204-06 (W.D. La. 1974); Brandenburger v. Thompson, 494 F.2d 885, 889 (9th Cir. 1974).

If this Court is to approve the private attorney general exception, it should limit such exception to cases in which it is found that plaintiffs have vindicated a clearly demonstrable "policy Congress considered of the highest priority . . . ." *Piggie Park, supra*, 390 U.S. at 402. If this requirement is not retained, then the private attorney general exception will ultimately eradicate the general rule barring fee awards not specifically authorized by statute.

The present case involves two statutory claims: that the Secretary did not adequately comply with NEPA, and that his action exceeded his authority by virtue of the width limitation contained in the Mineral Leasing Act. The court did not decide the NEPA issues and accordingly, for the reasons stated in the following section, no award for fees related to those issues can be sustained.

As to respondents' Mineral Leasing Act issues, under no conceivable theory can those issues be claimed to involve a statutory scheme of preeminent importance to the Congress. Indeed, Congress responded to the ruling of the court of appeals by amending the statute to eliminate the width restriction relied on by respondents and then *directed* the Secretary to issue permits for a right-of-way which varied in width up to 1000 feet or more. Pub. L. 93-153, 87 Stat. 576 (Nov. 16, 1973). In its subsequent decision on attorneys' fees, the court of appeals itself termed the width requirement in 30 U.S.C. § 185 "anachronistic" and considered it beneficial that Congress had "remove[d] the restrictions of the 1920 statute and permit-[ted] construction of the trans-Alaska pipeline." 495 F.2d at 1033.

Even at the time of its enactment, the provision in question did not reflect any strong congressional

concern, and any policy reflected in the numerical setting of the limitation was not of continuing or consistent importance to ensuing Congresses. The Mineral Leasing Act, while a product of the 66th Congress, had in fact been under consideration since at least 1914, and seven times during that six-year period various forms of the bill had been reported by committees in one or more houses of Congress. Neither in the session of Congress which enacted the Mineral Leasing Act, nor in any of the 1914-1920 era committee reports on similar legislation, is there so much as a mention of the width limitation which ultimately became part of section 20 of the Mineral Leasing Act of 1920.[23]

Thus neither the Congress which enacted the statutory restriction nor the Congress which amended it considered the width limitation of particular importance.[24]

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[23] *See* H.R. Rep. No. 668, 63d Cong., 2d Sess. (1914); S. Rep. No. 947, 63d Cong., 3d Sess. (1915); H.R. Rep. No. 206, 65th Cong., 2d Sess. (1917); H.R. Rep. No. 563, 65th Cong., 2d Sess. (1918); S. Rep. No. 392, 65th Cong., 3d Sess. (1919); H.R. Rep. No. 398, 66th Cong., 1st Sess. (1919); H.R. Rep. No. 600, 66th Cong., 2d Sess. (1920). The only apparent concern over the width limitation is reflected in a floor debate involving a handful of members of the House. Even in this limited discussion, there was no suggestion that the limitation constituted a major or important policy question. *See* 51 Cong. Rec. (Part 15) 15418-23 (1914); 53 Cong. Rec. (Part 2) 1095-96 (1916); 56 Cong. Rec. (Part 7) 7096-98 (1918).

[24] Examination of related and subsequent congressional legislation involving similar grants on land owned by the United States further indicates that there is no basis for ascribing special congressional concern to the specific limitation found in the 1920 Act. Virtually every statute since 1921 dealing with width limitations for right-of-way grants has permitted the executive significant discretion in determining the width of the grant. *See* 43 U.S.C. § 950; 43 U.S.C. § 946; Act of May 28, 1926, 44 Stat. 562; 43 U.S.C. § 956; Act of July 24, 1946, 60 Stat. 643; 43 U.S.C. § 961; 10 U.S.C. § 2668; 42 U.S.C. § 2201; 43 U.S.C. § 931a; 43 U.S.C. § 931c; 7 U.S.C. § 1985(d).

The majority of the court of appeals did not find in the 1920 Act any unique measure of congressional purpose. Faced with this major obstacle to the utilization of the private attorney general doctrine, the majority simply abandoned the requirement that the specific statute in question embody a policy of particular congressional concern:

> It is argued that the width limitation in Section 28 of the Mineral Leasing Act of 1920 does not amount to a congressional policy of preeminent importance. But the dispute in this case was more than a debate over interpretation of that Act.
>
> Appellees' primary argument was that, whatever the width restrictions in the act originally meant, a settled administrative practice to evade those restrictions took precedence. In the final analysis, this case involved the duty of the Executive Branch to observe the restrictions imposed by the legislative, see Freeman v. Ryan, 133 U.S. App. D.C. 1, 3, 408 F.2d 1204, 1206 (1968), and the primary responsibility of the Congress under the Constitution to regulate the use of public lands, Wilderness Society v. Morton, supra, 479 F.2d at 891-893. [495 F.2d at 1032-33.][25]

This rationale creates a private attorney general exception which engulfs the rule so far as federal

[25] This is a serious mischaracterization of what was a good-faith difference of view over the use of administrative practice to support a federal department's interpretation of a statute entrusted to its supervision. The majority itself characterized the position of defendants as "manifestly reasonable and assumed in good faith" (495 F.2d at 1029). The Department's position was based on an administrative practice of over fifty years; obviously there was no conscious intent by the Executive Branch here to avoid limitations imposed by the Congress.

statutes are concerned.[26] If, as the majority asserts, the results in cases such as this are to be based upon Congress' general interest in seeing all of its enactments faithfully enforced, then the requirement for finding a particularly important statutory provision is no longer a part of any private attorney general exception. Any alleged non-compliance with *any* statutory duty would justify invocation of the private attorney general exception.[27]

A brief examination of the product of just the first session of the 92d Congress reveals the unruliness of the concept expressed by the majority below. Of 224 public laws, 211 either pertain directly to the operations of federal departments or agencies or involve federal enforcement of a kind which could

[26] The court of appeals advances a subsidiary rationale which even more obviously tolls the end of the American fee rule, arguing that the doctrine should be abandoned where the fees are small in comparison to the value of the interests being litigated. In such cases, the court contends, there need be no fear that a fee award will discourage good faith litigants from instituting or defending actions to defend their rights. "Where the interest at stake is many times greater than the expected cost of one's appropriate attorneys' fees, any possibility of deterrence is surely remote, if not nonexistent." 495 F.2d at 1032. This standard is unworkable. How is a court to determine at which point the "stakes" are high enough that an award of attorneys' fees will not operate as a deterrent to good faith litigation? The courts are hardly in a position to make complex factual determinations on the practical deterrent impact of a fee award in relationship to the value of the litigation. These are the kinds of essentially legislative decisions which should be made by the Congress rather than the judiciary.

[27] Certainly the responsibility of the Congress to regulate the use of the public lands is not a factor which can logically justify the fee exception here. Congress has an equal interest in all other subjects which were placed in its jurisdiction by the Constitution, *e.g.*, regulation of all matters involving interstate commerce, immigration, imports and exports, and the raising of revenues.

produce statutory violations by federal officials. Only 13 can remotely be characterized as free of any potential involvement by federal officials.[28]

The only alternative to this abandonment of the American fee rule in favor of award under all statutes would be an essentially arbitrary selection by the courts of "qualifying" statutes, based upon an individual judge's conception of the public interest. Petitioner can conceive no objective or rational standards by which such a selection could be made. As the Court of Appeals for the Fourth Circuit has pointed out, courts are ill-suited to make judgments as to which statutes are important. *Bradley* v. *School Board, supra,* 472 F.2d at 330.[29] Moreover, a selection process would invite virtually endless attempts by litigants to have the judicial blessing extended to statutes of interest to them.

The danger of attempting to make determinations as to the importance of a particular policy is pointed up by the decision in this case. Four judges concluded that at least on the NEPA issues, respondents had attempted to vindicate an important policy. Three judges concluded that, far from *vindicating* an important policy, "these plaintiffs have been *frustrating* the policy Congress considers highly desirable and of the utmost urgency." 495 F.2d at 1042.

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[28] *See* Congressional Research Service (Library of Congress), Digest of Public General Bills & Resolutions, 92d Cong., 2d Sess. at 7-72 (1972).

[29] *See also* F. D. Rich Co. v. United States, *supra*, where the Court expressed a similar view on an analogous issue, concluding that it is "better to extricate the federal courts from the morass of trying to divine a 'state policy' as to the award of attorneys' fees in suits on construction bonds." 94 S. Ct. at 2164.

In short, the court of appeals' expansion of the private attorney general doctrine can have only two results—fee shifting under virtually every federal statute, or endless disputes over the selection of "deserving" statutes by the judiciary. Either result is a substantial departure from principles carefully maintained by this Court for more than a hundred years.

C. Fees Cannot Be Awarded Under The Private Attorney General Rationale For Issues On Which Plaintiffs Do Not Succeed

In addition to abandoning the requirement for finding an important congressional policy, the majority below also abandoned the second fundamental element set forth in *Piggie Park, supra,* 310 U.S. at 402: Awards can be made only to parties who *successfully* litigate an issue arising under a statute reflecting unusual congressional concern. This element is found in virtually every lower court case awarding fees on a private attorney general theory. None of the private attorney general cases cited by the court of appeals (495 F.2d at 1029-30) involved an award to an unsuccessful party except *Sierra Club* v. *Lynn,* 364 F.Supp. 834 (W.D. Tex. 1973), which has now been reversed (*see infra* at 4a).

The requirement that fees can only be awarded to a successful party is more than a technicality. Success in litigation is the only objective indicator that some statutory policy was vindicated. Indeed, to abandon the success requirement is doubly wrong, first because it destroys any connection between the litigation and a congressional objective, and second, because it ignores the fact that, by definition, another party *has prevailed* on the relevant issue, and it is both anomalous and unfair for parties to be subjected to

litigation, vindicated by the results, and yet compelled to pay for the other side's legal adventure.

Assuredly, awards cannot be made indiscriminately to any unsuccessful litigant. There must then be a selection, and presumably that selection is to be made on the basis of some perceived contribution to statutory purpose by the unsuccessful party. Yet, as will be developed *infra*, measuring contributions by indicia other than success involves judicial speculation as to whether, and to what extent, beneficial results might have occurred independently of the unsuccessful suit.

The success requirement is the only practical deterrent to ill-considered or frivolous litigation, with its attendant costs to unfortunate and involuntary, but successful, parties, and the attendant imposition upon the resources of the courts. One defender of the private attorney general exception has argued: "There need be no fear that this development will result in a flood of frivolous litigation. . . . [T]he attorney's only source of remuneration will be an award of fees by the court if he is successful."[30] No such assurance can be provided if the success requirement is abandoned.

In the present case, if one ignores the fact that Congress immediately amended the Mineral Leasing Act, respondents can be said to have been successful on some of their Mineral Leasing Act issues. But the court of appeals did not limit its award to issues on which respondents succeeded. Instead, it authorized respondents to recover attorneys' fees for all issues in the case, including NEPA issues.

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[30] P. Nussbaum, *Attorney's Fees in Public Interest Litigation*, 48 N.Y.U.L. Rev. 300, 333 (1973).

As to the NEPA issues, it is clear that respondents did not prevail. Respondents argued that the Secretary's environmental analysis was inadequate because he did not fully consider the trans-Canada alternative route. The district court rejected respondents' arguments, finding that the Secretary's decision satisfied the statutory requirements. 4 ERC 1467 (D.D.C. 1972). Four of the seven judges of the court of appeals refused to pass on the NEPA issues. 479 F.2d at 889. The other three judges concluded that the court should have decided the NEPA issues and that the Department of the Interior had fully satisfied its NEPA obligations. *Id.* at 905-12.

Finally, and dispositively, the Congress, whose interest in the application of NEPA affords the only basis for an award of attorneys' fees, promptly and unequivocally expressed its view by making a legislative finding that the Department's efforts were fully adequate. In so doing, Congress firmly rejected, among other things, the contention which had been the principal thrust of respondents before both the district court and the court of appeals: that the pipeline should be built through Canada. As Judge MacKinnon concluded in his dissent:

> [I]t is perfectly obvious that Congress' action in approving the Impact Statement by a rarely used legislative finding amounted to a "total rejection of the arguments made on appeal". . . .
>
> So the efforts of appellants' attorneys with respect to NEPA drew a complete blank. Under such circumstances, it is unreasonable by any fair standard to compensate them for that phase of the case. [495 F.2d at 1039-40.]

Thus, to justify an award of fees for work related to NEPA, the majority below had no choice but to

abandon the requirement of success in order to justify an award of attorneys' fees. In doing so, it dismissed as "not of controlling importance" both the absence of any decision favoring respondents and clear congressional rejection of respondents' position. 495 F.2d at 1034. In the stead of the recognized factor of objective success, the majority turned to a concept of judicially perceived benefit:

> Requiring the Department to draft an impact statement as mandated by law not only benefited the public's statutory right to have information about the environmental consequences of the pipeline. It also led to the refinement of environmentally protective stipulations placed as conditions of the rights-of-way. [495 F.2d at 1034.]

There are compelling reasons for rejecting the concept of subjective benefit which the majority advances —not the least of which is that its factual premise is at least partially incorrect.

While it is true that the Secretary was prepared to issue authority under which a road might be constructed adjacent to the proposed pipeline right-of-way, at the time of the preliminary injunction there was no indication that the Secretary intended to issue the pipeline right-of-way permits immediately. Indeed, the record reflects that the Secretary had told the applicants that no permit would be issued until the Department was "fully satisfied that the environment would be adequately protected."[31] Furthermore, the Secretary had prepared an environmental impact statement dealing with the road, but he had not yet done so with respect to the pipeline right-of-way ap-

[31] Transcript of proceedings in the district court, April 13, 1970, at 25.

plications, because no decision had been made with respect to proceeding on such applications. Government counsel indicated that the Secretary planned to prepare an environmental statement prior to approving any right-of-way application.[32]

The expansive policy adopted by the court of appeals imposes upon the federal judiciary the task, as difficult as it is inappropriate, of weighing what is a benefit to the public interest. The elusive nature of such determinations has been noted by one commentator:

> The term 'public interest', although frequently used here and elsewhere, raises serious conceptual difficulties. In a pluralistic society such as ours, it is difficult to maintain that there is a single public interest or that any particular policy is a priori in the public interest. Substantive approaches to a definition easily reduce to differences in subjective values. [Comment, *Court Awarded Attorneys' Fees and Equal Access to the Courts*, 122 U. of Pa. L. Rev. 636, 674 (1974).]

Perhaps the best measure of the difficulty of such benefit determinations is afforded by the decision of the court below. While the four members of the majority perceived a benefit, the other three judges concluded that respondents "have been *frustrating* the policy Congress considers highly desirable and of the utmost urgency." 495 F.2d at 1042 (emphasis in original). Against any arguable benefit resulting from respondents pressing their Mineral Leasing Act arguments, the dissent concluded that an overbalancing detriment existed with respect to respondents' "public

[32] *Id.* at 27.

*dis*service in blocking access to the much needed oil at a critical time in our history . . . ." *Id.* at 1043 (emphasis in original).[33] The subsequent congressional action in directing issuance of the permits, declaring the environmental study adequate, and prohibiting further litigation supports this view—as does the tremendous inflation in the cost of the pipeline and the three-year delay in partial relief of the nation from dependence upon oil imports from the Middle Eastern oil producing countries.

Finally, there is the considerable difficulty attendant upon determining questions of causation. There is every reason to believe that respondents' self-congratulatory assumption of credit for virtually every step which the government took in imposing careful environmental controls on the trans-Alaska pipeline and for the scope of the final environmental impact statement (*see* Brief in Opposition to Alyeska's Petition for Writ of Certiorari, at 4-7) cannot be justified by any examination of the underlying facts.

Such an examination would reveal that the Department of the Interior had initiated major and innovative procedures for evaluating the environmental effects of the proposed pipeline well before NEPA had become law, and continued them during the several months between its enactment and the promulgation of regulations concerning the preparation of environmental impact statements. These steps included (1) formation of a multi-agency federal task force, which included seven Interior bureaus, five federal departments, the National Science Foundation and the Office of Science and Technology (A. 79); (2) the formulation of an intial version of "environmental stipulations" (A. 49); (3) the conduct of public hearings in Alaska; (4) posing a wide range of questions to the applicants involving technical and environmental matters; and (5) the formation of a special technical group composed of career government officials with environmental responsibilities (A. 99, 183).

[33] Furthermore, there is a serious conceptual difficulty in basing a fee award for the entire litigation on activities which occurred in its initial stages. The major part of the attorneys' fees which were sought and awarded in the court below were spent in challenging the environmental impact statement which the Interior Department drew up after the preliminary injunction was entered. Assuming for the sake of argument that respondents' efforts were a major factor in generating the initial impact statement, this fact should not justify an award of fees for their subsequent unsuccessful efforts in challenging that impact statement.

All of these events took place before the Council on Environmental Quality, established by NEPA, had promulgated its May 1970 "Interim Guidelines" for complying with NEPA.[34] Indeed, respondents' suit in the district court, which they claim was the catalyst for invoking NEPA procedures and developing the ultimate environmental impact statement, came fully a month and a half before those initial guidelines were available to federal agencies.

The post-NEPA activities of the Department could be described at length. Briefly, they included appointment of a multi-agency Technical Advisory Board, preparation of what was, at the time, the most extensive draft environmental impact statement yet produced by a federal agency, holding public hearings in Alaska and Washington, D.C., formulation of further rounds of questions to the applicants, requiring the applicants to produce a 29-volume detailed description

[34] 35 Fed. Reg. 7390 (May 12, 1970).

of the proposed project, and creation of a major task force composed of career professionals in the environmental fields to prepare the final environmental statement.[31]

Respondents, in the court of appeals and in the brief filed in opposition to certiorari here, have assumed credit for the results of all these activities. In so doing, they overlook the genuine concern with environmental protection which characterized the actions of the highest appointed officials and the host of working-level employees of the Department of the Interior and the many other departments and agencies involved.

Furthermore, they overlook the fact that the Department was, during this period, learning from an unfolding series of judicial interpretations of NEPA the full scope of its NEPA responsibilities. When the Department began its efforts, there were no judicial interpretations of NEPA. Before the final environmental statement was completed, there were hundreds. It would be impossible to trace the impact of each of them on the Department's efforts, but any examination of the facts would reveal that such decisions as *Calvert Cliffs Coordinating Committee, Inc., v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971), and *Natural Resources Defense Council v. Morton*, 458 F.2d 827 (D.C. Cir. 1972), were major forces in shaping the Department's efforts to satisfy NEPA. Their impact was made clear when respondents took the deposition of Secretary Morton. In response to a question concerning the impact of *Natural Resources Defense Council*, the Secretary said of the decision:

> A. This was one of the things that affected it because we got into kind of a new ballgame as far as alternatives are concerned. Let me talk about that for a minute because that is important. When I first got into this business and talked to Pecora and we talked to our lawyers, my Solicitor's Office, I raised the question of what the definition of alternatives was. What is an alternative to an application for a pipeline from Valdez or from Prudhoe Bay to Valdez? Is it another route? Is it another system? Is it a system that is outside of the jurisdiction of the Department of Interior?
>
> All these were questions that were relatively unanswered because the law was new and the law was at that time being concurrently written by decisions that were forthcoming on many aspects of the NEPA Act.
>
> Frankly, my early concepts of what the alternatives were had to be modified as I grew into the job because I felt that the alternatives as I interpreted the Act meant that we were dealing with only alternatives that were within our jurisdiction.
>
> Then, as decisions were made and we began to learn how to operate within the NEPA Act, I had to broaden that a great deal which resulted in my saying some things early on in here that I would not say again at the same time having the same knowledge that I have now . . . . [Deposition of Secretary Morton, R. 225 at 63-64.]

Obviously, respondents are not entitled to claim credit for the impact of other environmental litigation on the Department's efforts, or for unfolding judicial interpretations of NEPA.

[31] The various actions of the Department of the Interior are described more fully in Alyeska's brief in the court of appeals on National Environmental Policy Act issues, at 6-35, A. 178-209.

None of these developments were considered by the majority of the court of appeals, despite their obvious relevance to any conclusion that respondents were entitled to credit for bringing about compliance with NEPA. If there is to be an application of the private attorney general doctrine in favor of parties not prevailing on litigated issues, there must at least be an opportunity to have hearings in the district court on the relationship between claimed benefits and the actions of respondents. The very need for such collateral proceedings to fairly assess such claims demonstrates the lack of wisdom in departing from the requirement that fee awards go only to successful litigants.

D. There Is No Necessity For Any Award Of Fees In This Case; In No Event Is There Justification For An Award In Excess Of The Amounts Actually Paid By Respondents To Their Attorneys

Necessity is the key to justifying any exception to the American fee rule. The private attorney general exception was generated by the need to provide incentive for enforcement efforts by private citizens as well as the necessity of avoiding the unfairness involved where a particular citizen bears the cost of major civil rights litigation efforts. *See Lee* v. *Southern Home Sites,* 444 F.2d 143, 147 (5th Cir. 1971). Where the need to provide an incentive does not exist, the private attorney general rationale is not applicable. *See, e.g., Ross* v. *Goshi,* 351 F. Supp. 949, 956 (D. Hawaii 1972), where the court found that there was "no necessity for an award of fees" because "legal services' attorneys can function as private attorneys-general irrespective of whether the court awards them counsel fees." Similarly, in *Lykken* v. *Vavreck,* 366 F. Supp. 585, 598 (D. Minn. 1973), the court found a fee award to lawyers who agreed to take cases without compensation incompatible with the whole purpose of the private attorney general doctrine.

The instant case presents a different situation from the civil rights cases where unsalaried attorneys seek to represent individual plaintiffs acting to vindicate important individual rights. This case involves litigation conducted by nationwide environmental organizations specifically organized to pursue such litigation. The three organizations involved here, The Wilderness Society, Environmental Defense Fund, and Friends of the Earth, are major litigation institutions. Their combined membership totals over 150,000. They finance litigation all across the United States. Wilderness Society alone has a budget of over $1,600,000. During the last three years, these organizations have been involved in approximately 50 reported court decisions involving environmental issues. The attorneys who represented these organizations in this case were the salaried employees of the plaintiff organizations, or of other organizations, such as the Center for Law and Social Policy, specifically organized to provide litigation assistance on public issues. (R. 70.) With such organizations available, supported by public, tax deductible contributions, these cases will continue to be brought, whether or not fees are awarded. As the three dissenting judges observed:

> [T]he prosecution of litigation of this sort was one of the objects and purposes for which the plaintiff organizations were chartered and existed. We think it unrealistic to say that no suit would have been brought if the plaintiffs had not

> been able to count on the payment by others of the salaries of their staff attorneys. The plaintiffs were equipped and prepared to act, and no added financial encouragement was necessary. [495 F.2d at 1043.] [36]

See also Gray v. *Creamer*, 376 F. Supp. 675, 682 (W.D. Pa. 1974), in which the court refused to award fees under the private attorney general theory where the type of litigation involved clearly needed no financial incentive:

> Certainly the award of attorneys' fees is an encouragement to the bringing of suit and the vindicating of rights which might otherwise not be accomplished. However, the Court takes judicial notice of the virtual flood of prisoners' § 1983 complaints. Little if any encouragement is needed by way of awarding attorneys' fees in a case such as this matter before the Court.

The burgeoning number of environmental cases generally [37] and the number engaged in by these plaintiffs in particular, are further evidence that no incentive need be provided by approving an unsound expansion of the exception to the American nonaward doctrine. The majority considered it "a happy result of [its] decision" that such decision "may increase the willingness of skilled lawyers throughout the nation to undertake public interest litigation on behalf

[36] The dissenters also observed that "counsel for plaintiffs . . . represented to the District Court that there would be no attorneys' fees charged in this case" and that "for the plaintiffs now to claim and be awarded attorneys' fees, in direct contradiction to their sworn representations to the court . . . , is intolerable." 495 F.2d at 1045, 1046.

[37] The Environmental Reporter lists more than 850 reported decisions in the period 1970-1973.

of unmonied clients with just, lawful, and important claims." 495 F.2d at 1038 n. 9. However, when Congress did not deem it necessary to encourage litigation by awarding fees in such cases, the declared efforts of the majority of the court of appeals to do so as a matter of policy seems wholly inappropriate.

In contrast to the situation in many cases involving constitutional rights, no individual is forced to bear the litigation expenses of this or most other environmental suits. The necessity of preventing any unfair litigation burden from falling on a private individual does not exist where major environmental organizations themselves perform a fee-spreading function. The normal operation of the organization spreads the costs of litigation to those who perceive it as beneficial or desirable. Indeed, each of the respondent organizations solicited membership contributions for the very purpose of supporting this suit.

Finally, assuming *arguendo* that *some* award is proper in the circumstances of this case, there is no justification for the holding of the majority that "[t]he fee award need not be limited . . . to the amount actually paid or owed by [respondents]." 495 F.2d at 1037. All counsel for respondents were salaried employees of the complaining organizations, and it would have been simple to calculate an award based on their salaries while working on this case. No greater financial encouragement would serve any useful purpose. Payment of a bonus to respondents' counsel on the theory that they have "vindicated" a public policy in this case merely subsidizes other litigation which may or may not vindicate such a policy.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals on attorneys' fees should be reversed and the case remanded to that court with instructions to deny all claims for such fees.

Respectfully submitted,

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APPENDIX

Section 28 of The Mineral Leasing Act of 1920, 41 Stat. 449, 30 U.S.C. § 185 (1970).

Rights-of-way through the public lands, including the forest reserves of the United States, may be granted by the Secretary of the Interior for pipeline purposes for the transportation of oil or natural gas to any applicant possessing the qualifications provided in section 181 of this title, to the extent of the ground occupied by the said pipe line and twenty-five feet on each side of the same under such regulations and conditions as to survey, location, application, and use as may be prescribed by the Secretary of the Interior and upon the express condition that such pipelines shall be constructed, operated, and maintained as common carriers and shall accept, convey, transport, or purchase without discrimination, oil or natural gas produced from Government lands in the vicinity of the pipeline in such proportionate amounts as the Secretary of the Interior may, after a full hearing with due notice thereof to the interested parties and a proper finding of facts, determine to be reasonable: *Provided*, That the common carrier provisions of this section shall not apply to any natural gas pipeline operated by any person subject to regulation under the Natural Gas Act or by any public utility subject to regulation by a State or municipal regulatory agency having jurisdiction to regulate the rates and charges for the sale of natural gas to consumers within the State or municipality: *Provided further*, That the Government shall in express terms reserve and shall provide in every lease of oil lands under this chapter that the lessee, assignee, or beneficiary, if owner, or operator or owner of a controlling interest in any pipeline or of any company operating the same which may be operated accessible to the oil derived from lands under such lease, shall at reasonable rates and without discrimination accept and convey the oil of the Government or of any citizen or company not the owner of any pipe line, operating a lease or purchasing gas or oil under the provisions of this chapter: *Provided further*, That no right-of-way shall hereafter be granted over said lands for the transportation of oil or natural gas except under and subject to the provisions, limitations, and conditions of this section. Failure to comply with the provisions of this section or the regulations and conditions prescribed by the Secretary of the Interior shall be

ground for forfeiture of the grant by the United States district court for the district in which the property, or some part thereof, is located in an appropriate proceeding.

Section 102 of The National Environmental Policy Act of 1969, 83 Stat. 853, 42 U.S.C. § 4332 (1973).

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall:

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on:

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropiate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(H) assist the Council on Environmental Quality established by subchapter II of this chapter.

SIERRA CLUB et al., Plaintiffs-Appellants-Cross Appellees,

Edwards Underground Water District et al., Intervenors-Appellants-Cross Appellees,

v.

James T. LYNN, Secretary of the U. S. Department of Housing and Urban Development, et al., Defendants-Appellees-Cross Appellants,

San Antonio Ranch, Ltd., Defendant-Appellee-Cross Appellant,

Texas Water Quality Control, Intervenor.

No. 73–3378.

United States Court of Appeals, Fifth Circuit.

Oct. 4, 1974.

Citizens groups brought action for declaratory and injunctive relief with respect to development of new community under housing and urban development program. State Water Quality Board intervened on behalf of defendants, and underground water district intervened with county on behalf of plaintiffs. The United States District Court for the Western District of Texas at San Antonio, Adrian A. Spears, Chief Judge, 364 F.Supp. 834, entered orders and appeals were taken. The Court of Appeals, Clark, Circuit Judge, held that Secretary of HUD acted neither arbitrarily nor capriciously, nor failed to act in accordance with law when he determined to grant developers of the new community federal assistance under the Urban Growth and New Community Development Act; that environmental impact statement filed by HUD was

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sufficient; that plaintiffs failed to state claim under the Water Pollution Prevention and Control Act; that in absence of proof that developer controlled the government agency's actions or caused its default, it could not be cast in judgment for attorney fees; and that as there remained no unadjudicated claim upon which relief could be granted, trial court improperly retained jurisdiction.

Affirmed in part, reversed in part and remanded.

1. United States ⇐53(9)

Judicial review of decision of Secretary of HUD to guarantee financing for initial development of new community was governed by the Administrative Procedure Act. 5 U.S.C.A. §§ 701 et seq., 706(2)(A); 28 U.S.C.A. § 1331(a).

2. United States ⇐53(9)

Appropriate standard of review of decision of Secretary of HUD to guarantee financing for initial development of new community was whether the Secretary's action was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law, and reviewing court would determine whether the agency considered all relevant factors in reaching its decision, or whether the decision itself represented a clear error of judgment. 5 U.S.C.A. § 706(2)(A).

3. United States ⇐53(9)

Where none of the facts necessary to sustain plaintiffs' attacks on HUD's compliance with the applicable federal statutes in deciding to guarantee financing for new community were unavailable to plaintiffs or within the exclusive possession or undisclosed by the agency, trial court properly required plaintiffs to establish their claims by a preponderance of the evidence as to each of their claims. 5 U.S.C.A. § 706(2)(A).

4. Courts ⇐406.3(24)

Findings, in action to prevent development of new community pursuant to program of housing and urban develop-

ment, that HUD did not act arbitrarily, capriciously or unlawfully when it found the community to satisfy each statutory condition for federal financing guarantee were not clearly erroneous. New Communities Act of 1968, § 402 et seq., 42 U.S.C.A. § 3901 et seq.; Urban Growth and New Community Development Act of 1970, §§ 701–703, 712, 42 U.S.C.A. §§ 4501–4503, 4513.

5. Health and Environment ⇐25.5

HUD's commitment to guarantee $18,000,000 in bond obligations for development of new community pursuant to program of housing and urban development constituted a "major federal action" significantly affecting the quality of the human environment, subjecting that decision to the full disclosure provisions of the National Environmental Policy Act. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

See publication Words and Phrases for other judicial constructions and definitions.

6. Health and Environment ⇐25.10

Council on Environmental Quality guidelines providing 30-day period for circulation of impact statement for public comment, although highly persuasive, do not govern compliance with the National Environmental Policy Act. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

7. Health and Environment ⇐25.10
United States ⇐53(9)

HUD's commitment to guarantee bond obligations for new community, and HUD's environmental impact statement, were not fatally undermined by the direct participation of the developer and his experts in the underlying environmental and other studies. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

8. Health and Environment ⇐25.10

The National Environmental Policy Act does not permit the responsible federal agency to abdicate its statutory duties

by reflexively rubber-stamping an environmental impact statement prepared by others; the agency must independently perform its reviewing, analytical and judgmental functions and participate actively and significantly in the preparation and drafting process. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

9. Administrative Law and Procedure ⇐476

In absence of bad faith or misplaced reliance, an agency faced with numerous applications for assistance and endowed with finite internal resources to implement congressional policy cannot be expected to ignore useful and relevant information merely because it emanates from an applicant.

10. Health and Environment ⇐25.10

Guidelines of Council on Environmental Quality and the Environmental Protection Agency regulations regarding preparation of environmental impact statements contemplate submission of initial environmental information by the applicant to the agency. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

11. Health and Environment ⇐25.10

HUD did not improperly delegate its statutory responsibilities in preparing environmental impact statement for new community by reason of the participation of the developer and his experts in the underlying environmental and other studies. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

12. Health and Environment ⇐25.10

Inasmuch as district court's order holding in abeyance litigation concerning development of new community under housing and urban development program and developer's agreement to HUD's call for a moratorium on construction effectively maintained the status quo pending completion of addendum to HUD's environmental impact statement, it was not incumbent on court to require that HUD withdraw its

contingent commitment offer. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

13. Health and Environment ⇐25.10

While formally correct environmental impact statements and technical compliance with the National Environmental Policy Act and complimentary guidelines are required, an initial finding of noncompliance must not irrevocably preclude eventual compliance; compliance must be measured by the contents of the final statement. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

14. Health and Environment ⇐25.10

HUD's environmental impact statement for new community was not insufficient on theory it failed to examine the secondary or indirect environmental impacts from expected neighboring "parasite" developments; to set out a cost-benefit analysis of the project; to consider cumulative impacts; to discuss adequately the relationship between local short-term uses of the environment and maintenance and enhancement of long-term productivity; or to treat fully outside comments and opinions. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

15. Health and Environment ⇐25.10

That factors in determining environmental costs and risks with respect to development of new community under housing and urban development program are generally imprecise and unquantifiable does not render impact statement inadequately detailed. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

16. Health and Environment ⇐25.5

National Environmental Policy Act does not demand that every federal decision be verified by reduction to mathematical absolutes for insertion into a precise formula. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

17. Health and Environment ⇐25.10

Sufficiency of environmental impact statement under the National Environmental Policy Act must be judged in light of the nature of the federal action and the underlying implementing federal legislation. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

18. Health and Environment ⇐25.10

Agency providing environmental impact statement must consider appropriate alternatives which may be outside its jurisdiction or control, and not limit its attention to just those it can provide. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

19. Health and Environment ⇐25.10

HUD's environmental impact statement with respect to development of community lying on portion of zone of land taking surface waters to underground water-bearing formation supplying water for city of San Antonio was not insufficient by reason of failure to discuss either the acquisition of the recharge zone as a park at a prohibitive cost, or the elimination of all federal assistance to any development over the recharge zone. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

20. United States ⇐53(9)

Statute permitting HUD to plan large-scale projects on federally owned lands does not obligate HUD to search out a competing applicant willing to develop and finance a project on an alternate site or to work up a counterproposal of its own before it can pass on the merits of a properly submitted new community application. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

21. Health and Environment ⇐25.10

HUD's environmental impact statement pertaining to new community application fully complied with the National Environmental Policy Act where it furnished sufficient information to permit a reasoned choice of alternatives so far as

environmental aspects were concerned. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

22. Health and Environment ⇐28

Precautions required by HUD to protect quality of water supplied to residents of city of San Antonio by area on which new community was to be constructed were adequate. National Environmental Policy Act of 1969, §§ 2, 102(2)(C), 42 U.S.C.A. §§ 4321, 4331(2)(C).

23. Health and Environment ⇐28

Citizens' groups suing to prevent development of new community to be located astride portion of zone of land supplying water to city of San Antonio failed to state claim for violation of Federal Water Pollution Control Act. Federal Water Pollution Control Act Amendments of 1972, §§ 101 et seq., 101(a), 102(a), 301, 309, 33 U.S.C.A. §§ 1251 et seq., 1251(a), 1252(a), 1311, 1319.

24. Federal Civil Procedure ⇐2737.6

In absence of proof that the private party controlled the government agency's actions or caused its default, private party cannot be cast in judgment for attorney fees as a result of the agency's shortcomings even if agency is immune from liability for financial redress.

25. Federal Civil Procedure ⇐2737.6

Citizens' groups which brought action which directly caused HUD's full compliance with National Environmental Policy Act on new community project could not recover attorney fees from developer which successfully defended the lawsuit and which was not shown to have been unreasonable or to have unduly protracted the litigation. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.; 28 U.S.C.A. § 2412.

26. Courts ⇐30

Rendition of definitive judgment in suit to prevent development of new community under housing and urban development program ended the litigable aspects of the dispute and, in absence of evidence indicating that HUD would fail to discharge faithfully its statutory functions, trial court improperly retained jurisdiction. 28 U.S.C.A. § 1331(a).

27. Health and Environment ⇐25.5

District court must abjure the role of a quasi-administrative agency for environmental affairs. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

28. United States ⇐53(9)

Judgment and grant of relief disposing of litigation seeking to prevent development of new community under housing and urban development program could compel parties to file in a convenient local public office such reports as they might in the future make that contain material of public interest. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

29. Courts ⇐281

Although mere voluntary cessation of allegedly illegal conduct does not moot a case, federal jurisdiction must be founded upon at least a mere possibility of recurrence which serves to keep the case alive.

Appeals from the United States District Court for the Western District of Texas.

Before WISDOM and CLARK, Circuit Judges, and GROOMS, District Judge.

CLARK, Circuit Judge:

An offer of commitment by the United States Department of Housing and Urban Development (HUD) to guarantee an 18 million dollar private bond issue for the development of San Antonio Ranch New Town (Ranch) spawned this environmentalist litigation against defendants James T. Lynn, Secretary of HUD, and San Antonio Ranch, Ltd., the developer.

Charging violations of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 et seq., and the Urban Growth and New Community Development Act of 1970 (Title VII), 42 U.S.C. § 4501 et seq., four citizens groups (the Sierra Club, Citizens for a Better Environment, League of Women Voters of the San Antonio Area, and American Association of University Women, San Antonio Branch) and their individual members, as plaintiffs, sought declaratory and injunctive relief barring defendants from issuing or accepting either the bond guarantee or any other federal assistance supporting development of the Ranch until the proposed project complied with NEPA and Title VII. Thereafter, the district court permitted the Texas Water Quality Board to intervene on behalf of the defendants, and the Edwards Underground Water District, which had intervened along with Bexar County, Texas on behalf of the plaintiffs, amended its original complaint to allege that development of the Ranch also contravened the Water Pollution Prevention and Control Act Amendments of 1972, 33 U.S.C. § 1251 et seq.

Depending upon which party's view is accepted, the Ranch will be either an urban planner's utopia incarnate or an environmental disaster of the first magnitude. As conceived by the developer, a limited partnership composed of individuals experienced in real estate, construction, financing and new town management, the Ranch will convert 9,318 acres of predominantly virgin Texas hill country land in the northwest quadrant of Bexar County, Texas into a "free standing" new community of 87,972 residents living in 28,676 housing units (41%—single family detached houses, 6%—townhouses, 45%—medium density apartments, and 8%—high density apartments), of which one-fourth will accommodate low and moderate income families, through staged construction over a 30-year period. The Ranch site, which is presently virtually undisturbed and primarily used for ranching, grazing and occasional hunting, is dominated topographically (85%) by hill country and rocky soil characterized by 100 to 200 ft. differentials in elevation. The southern 1200 acres (15%) consists mainly of flat terrain and agriculturally productive soil. An expanding network of regional highways serving the area will be supplemented by an external mass transit system connecting the Ranch to downtown San Antonio, approximately 20 miles away, the South Texas Medical Center, a distance of 10 miles, the University of Texas at San Antonio, a 6-mile trip, and the San Antonio International Airport, currently a 25-minute drive. The developer will contract for essential municipal services and public utilities with the City of San Antonio, whose City Council has adopted a resolution favoring eventual annexation of the entire project.

More than half of the Ranch acreage will be devoted to residential development and internal roads. The project contemplates over 2200 acres of open space, which includes a 2,000 acre greenway system, two 18-hole golf courses, three recreational use lakes, neighborhood recreation centers with swimming pools and tennis courts and a continuous hiking and bicycle trail system. 12,750 employees are expected to work in two industrial and research and development parks totaling 1,234 acres. A 500 acre vocational training and technical center, featuring public or private affiliated educational and training facilities, will staff 430 employees, and it is estimated that 4,480 persons in public jobs will service the Ranch population. Of the 180 acres set aside for commercial use, 150 acres will be devoted to a town center that will act as the gateway to the entire Ranch, providing the focus of civic, entertainment, office employment and shopping activities. Two educational parks and 13 elementary school sites will cover 330 acres. In general the land use plan seeks to take maximum advantage of the area's variation in topography by clustering common or public facilities along an "activity belt," a major right-of-way loop that envelopes the community and laces its components together. The center of the Ranch forms a residential island and the network of canyons affords the basis for a continuous green belt system that will permit a person

to bicycle or walk or horseback ride from the town center to any point within the Ranch without crossing a major thoroughfare.

The spectre of environmental doom is raised by the fact that the proposed development lies astride a portion of the zone of land which takes surface waters to the Edwards Aquifer, an underground water bearing formation that is the sole water supply for the City of San Antonio and 1,000,000 area residents. The aquifer region has been estimated to be approximately 175 miles in length with a varying width of 5 to 45 miles, encompassing a crescent-shaped surface area of 3½ million acres that extends over more than 7 counties. Ground water flows freely (in terms of miles per day) in an easterly direction through the Edwards formation of extremely permeable limestone, which averages 500 feet in thickness, until it is cut by the Balcones fault system. Northwest of the fault the surface limestone is upthrown to form the Edwards Plateau. In this region, honeycombed with fissures and cracks, ground water percolates through the stratum and is found under normal, unconfined water-table conditions. Southeast of the fault line, however, the limestone formation is downthrown, sloping from a surface recharge area near the fault line south and east hundreds of feet below the surface, and overlaid with less permeable and younger rocks, which confine the ground water in the underground reservoir from which San Antonio draws its water supply.

The artesian reservoir is replenished annually with approximately 500,000 acre feet of water from three major sources. Most of the recharge is attributable to 14 surface streams on the Edwards Plateau that flow across fractures and joints in the fault zone, through which water filters down to the aquifer. This recharge zone varies in width from ½ to several miles and extends 80 or more miles above the Balcones fault system. It consists of many small pores and fissures inlaid among less permeable material. The second major source is underflow from one area of the reservoir that recharges

another. Least significant is the recharge produced from rain falling directly on the exposed "outcrops" of limestone in the upthrown region. This precipitation seeps through honeycombed passages and eventually filters its way into the reservoir.

Plaintiffs contend that if water entering the recharge zone is polluted, the entire aquifer will become contaminated. The Balcones Fault dissects the Ranch site latitudinally at the Haby Crossing Fault. Only about 13% of the annual rainfall on the site is eventually introduced to the underground reservoir. The rest is consumed by vegetation, evaporated or removed as surface run-off. Since none of the 14 major stream beds or recharge areas is located on the Ranch, the recharge emanating from the Ranch is generally estimated at only one-half of one percent of the total annual recharge to the aquifer.

The Ranch moved from the drawing board to the bureaucracy when the developer approached HUD in February of 1970 to explore the possibilities of federal assistance under Title VII. Marketing studies had shown that the development envisioned by the preliminary master plan would capture 15% of Bexar County's projected growth. During the prior decade almost half of the county's total population increase (143,000) had occurred in the northwest quadrant, whose influx of residents was expected to continue. Favorably impressed with the planning studies and pre-application proposal, HUD invited the developer to submit a formal application. Eight months later HUD's Office of New Community Development received the formal application and fee of 5,000 dollars and undertook a full agency review of the project.

Early concern for the integrity of the aquifer surfaced in many quarters. At HUD's suggestion the developer retained a geologist-hydrologist, Dr. L. J. Turk, to examine the project. A review of the Ranch was conducted by the Alamo Area Council of Governments, a regional multi-governmental planning organization composed of 16 representatives from the

Edwards Water District, Bexar County and the 11 surrounding counties, which endorsed the project subject to two subsequently adopted conditions: (1) that HUD require thorough environmental impact studies, particularly as to the effect of storm water run-off; and (2) that the sanitary sewer system of the Ranch be connected and treated off the site by the City of San Antonio's regional waste water system. The Texas Water Quality Board and San Antonio city officials were informed of and commented upon the environmental hazards to the aquifer and the steps being taken to protect it. A team of HUD New Community Development staff members, including a civil engineer, a lawyer, an economist, an urban planner, a financial expert and an architect, was formed to prepare an environmental impact statement. The internal agency review of the Ranch's application culminated in a favorable Title VII critique of the project by the Assistant HUD Secretary for Community Planning Development, who submitted his report to the Board of Directors of HUD's Community Development Corporation in August of 1971 before the draft impact statement was circulated for public comment on September 13.

Of 13 public agencies solicited, 7 submitted written comments that were incorporated with comments volunteered by 9 other agencies or groups, including some of the plaintiffs, into the "final" impact statement issued on January 20, 1972 for further circulation and public comment.[1] Just over one month later, on February 23, 1972, convinced that the Ranch was eligible under the Act for a federal financing guarantee of up to 18,000,000 dollars, HUD proffered an offer of commitment that was contingent upon, *inter alia*, the developer's agreement to (1) a moratorium prohibiting development over the recharge zone of the aquifer until completion of a compre-

1. In December of 1971 the Edwards Underground Water District, the San Antonio Independent School District, the Bexar County Commissioners Court and the San Antonio River Authority adopted resolutions opposing urban development over the aquifer. Each resolution was included in an August 1972 addendum to the final environmental impact statement.

hensive environmental study of the recharge zone by the developer and until approval by the HUD Community Development Board and the Texas Water Quality Board of the measures proposed to protect the natural conditions disclosed by the study, (2) review and comment thereon by a public and interagency board organized to the satisfaction of HUD, and (3) the adoption of treatment methods and other continuing measures such as the monitoring of water quality, required by the Community Development Board and the Texas Water Quality Board.

On the same date plaintiffs filed their complaint in this action and sought a temporary restraining order. Without reaching the merits, the district court granted defendants' motion to hold the case in abeyance until the developer had satisfied the conditions in the offer of commitment and executed a project agreement with HUD. Subsequently, HUD formed the San Antonio Water Quality Advisory Review Board, composed of representatives from 18 public agencies and Bexar County, which conducted four separate public meetings and examined the impact of the project on the aquifer. This group inspected four reports submitted by Dr. Turk and the developer's other experts concerning continued studies of storm water and ground water quality at the Ranch, geological mapping of the site and soil renovation of storm water. It also surveyed the developer's plans for sanitary sewage collection and treatment facilities; transportation and storage of dangerous liquids; solid waste storage, collection and disposal; storm water controls; water quality monitoring system; and the legal controls supporting the inspection and enforcement of environmental quality programs.

In addition, HUD retained Dr. Henry V. Beck, a Kansas State University geologist, who, assisted by associates with expertise in environmental health engineering, hydrology and soil mechanics, independently reviewed the environmental studies and aspects of the entire project. Citations of approv-

al of the Ranch by the advisory board and Dr. Beck and their recommendations for improving environmental controls over the aquifer and the water quality monitoring system were forwarded to HUD for consideration and inclusion with additional ecological and the underlying scientific studies in an addendum to the "final" impact statement, which was circulated on August 24, 1972 among 38 public agencies or groups for additional study and comment. The Alamo Area Council of Governments, the San Antonio City Council, Water and Public Service Boards, the Texas Water Quality Board, the Governor's office and the State Department of Health approved the project as environmentally sound and consistent with regional land use planning. In October HUD concluded that the developer had satisfied each of the conditions contained in the letter of commitment and proceeded to commence negotiations leading to a project agreement.

After lengthy pre-trial maneuvering and assimilation of 9 days and 1920 pages of trial testimony, which generated voluminous exhibits, including a seven volume administrative record and three impact statements, the district court denied the relief sought by plaintiffs and entered judgment for the defendants, concluding that HUD had complied with the provisions of each federal statute. Furthermore, the court resolved to retain jurisdiction over the lawsuit for so long as might be necessary to ensure that the proposed environmental safeguards are fully instituted and implemented, and to require the parties to file with the court copies of all data and reports relating to the Ranch and other developments in the surrounding area. Finally, counsel for the plaintiffs were awarded 20,000 dollars in attorneys' fees, costs and expenses to be paid by the defendant developer. Sierra Club v. Lynn, 364 F.Supp. 834 (W.D.Tex.1973).

Plaintiffs appeal from the decision on the merits for defendants, renewing each of their statutory contentions, and asserting that the court improperly saddled them with the burden of proof. They also appeal from the amount of the attorneys'

fees award. The developer cross-appeals from the grant of such fees against it, and Secretary Lynn cross-appeals from the district court's determination to retain jurisdiction. For the reasons that follow, we affirm the decision of the court below on the merits, and reverse its award of attorneys' fees and its retention of jurisdiction.

[1, 2] The district court correctly ruled that it was vested with jurisdiction under 28 U.S.C. § 1331(a) and that plaintiffs possessed standing, *see* Sierra Club v. Morton, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972). It also properly concluded that judicial review of the Secretary's substantive Title VII decision to guarantee financing for initial development of the Ranch project is governed by the Administrative Procedure Act (APA), 5 U.S.C. § 701 et seq. Since neither Title VII nor the APA requires the agency to conduct a hearing or make formal findings when passing on new community applications, the appropriate standard of review is whether the Secretary's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see* Camp v. Pitts, 411 U.S. 138, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973). Under this standard the appellate court must determine whether the agency considered all relevant factors in reaching its decision, or whether the decision itself represents a clear error in judgment.

> Where NEPA is involved, the reviewing court must first determine if the agency reached its decision after a full, good faith consideration and balancing of environmental factors. The court must then determine, according to the standards set forth in §§ 101(b) and 102(1) of the Act, whether "the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values." Calvert Cliffs' Coordinating Committee v. U. S. Atomic Energy Commission, 146 U.S.App. D.C. 33, 449 F.2d 1109, 1115 (1971).

Environmental Defense Fund, Inc. v. Corps of Engineers, 470 F.2d 289, 300 (8th Cir. 1972), cert. denied, 412 U.S. 931, 93

S.Ct. 2749, 37 L.Ed.2d 160 (1973). "Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416, 91 S.Ct. 814, 824, 28 L.Ed.2d 136 (1971).

[3] In a motion to the trial court plaintiffs asserted that "once a prima facie showing has been made that the federal agency has failed to adhere to the requirements of NEPA, the burden must, as a general rule, be laid upon this same agency which has the labor and public resources to make the proper environmental assessment and support it by a preponderance of the evidence contained in the impact statement." Sierra Club v. Froehlke, 359 F.Supp. 1289, 1335 (S.D.Tex.1973), reversed sub nom., Sierra Club v. Callaway, 499 F.2d 982 (5th Cir. 1974). Without formally responding, the district court apparently applied the standard burden of proof—plaintiffs were required to establish their claims by a preponderance of the evidence without any tactical shifting of that burden. Since none of the facts necessary to sustain plaintiffs' attacks on HUD's compliance with the applicable federal statutes were unavailable to the plaintiffs or within the exclusive possession of or undisclosed by the agency, the district court properly imposed the standard evidentiary burden on plaintiffs as to each of their claims. Sierra Club v. Callaway, 499 F.2d 982, 992 (5th Cir. 1974); *see* Environmental Defense Fund, Inc. v. Corps of Engineers, 492 F.2d 1123 (5th Cir. 1974).

I.

The Urban Growth and New Community Development Act

Increasing concern over the deterioration of urban life led Congress to enact The Urban Growth and New Community Development Act as Title VII of the Housing and Urban Development Act of 1970, Pub.L. No. 91–609, 84 Stat. 1791, expanding a similar program that was authorized by the Housing and Urban Development Act of 1968, see 42 U.S.C.

§ 3901 et seq. Over the last century the increasingly mobile quality of life in America has produced a pattern of population redistribution in which the migration of persons from rural areas to a small number of densely populated, congested central cities is followed by the flight of middle and higher income families and businesses from these urban centers to the suburbs. This pattern of movement has resulted in a polarization of the residents of city and suburbia by income, race, education, social philosophy and life style.

In order to treat the source rather than the symptoms of such social, economic and environmental problems, Title VII was designed (1) "to provide for the development of a national urban growth policy," 42 U.S.C. §§ 4501–4503, and (2) "to encourage the rational, orderly, efficient, and economic growth, development, and redevelopment of our States, metropolitan areas, . . . and communities in predominantly rural areas . . . [and] the prudent use and conservation of our natural resources by assisting public and private efforts in the development of well-planned, comprehensive new communities that will contribute to better environments, produce improved living conditions, add to the supply of adequate housing, especially for persons of low and moderate income, promote sound economic growth and employment and provide a viable alternative to disorderly urban growth. 42 U.S.C. § 4501; *see also* 42 U.S.C. § 4511(f). To achieve its broad commitment, Congress envisioned that the federal government, acting through the Community Development Corporation, 42 U.S.C. § 4532, would assist four general types of new communities:

(1) Economically balanced new communities within metropolitan areas, which would serve as alternatives to urban sprawl;

(2) Additions to existing smaller towns and cities which can be economically converted into growth centers to prevent decline and accommodate increased population;

(3) Major new-town-in-town developments to help renew central cities, including the development of areas adjacent to existing cities, in order to increase their tax base; and

(4) Free standing new communities where there is a clear showing of economic feasibility, and which would be built primarily to accommodate expected population growth.

H.R.Rep. No. 91-1556, U.S.Code Cong. & Admin.News, 91st Cong., 2d Sess., at pp. 5582, 5587-5588 (1970). As a result of its study of the problem, Congress found that the development of such new communities on a national scale had been crippled by the financial and administrative difficulties "of raising a large initial investment which would yield a delayed, irregular cash return; of assembling suitable sites of sufficient size; and in coordinating site and related improvements among all involved public and private sectors," Sierra Club v. Lynn, *supra*, 364 F.Supp. at 838; *see* 42 U.S.C. § 4511(e). Thus Congress provided in the Act for several forms of federal assistance including guarantees of the debt obligations of public and private new community developers to assist in financing land acquisition and development and in constructing public facilities, 42 U.S.C. § 4514.[2]

2. The eligibility requirements for Title VII financing guarantees are codified at 42 U.S.C. § 4513:

(a) A new community development program is eligible for assistance under this part only if the Secretary determines that the program (or the new community it contemplates)—

(1) will provide an alternative to disorderly urban growth, helping preserve or enhance desirable aspects of the natural and urban environment or so improving general and economic conditions in established communities as to help reverse migration from existing cities or rural areas;

(2) will be economically feasible in terms of economic base or potential for economic growth;

(3) will contribute to the welfare of the entire area which will be substantially affected by the program and of which the land to be developed is a part;

(4) is consistent with comprehensive planning, physical and social, determined by the Secretary to provide an adequate basis for evaluating the new community development program in relation to other plans (including State, local, and private plans) and activities involving area population, housing and development trends, and transportation, water, sewerage, open space, recreation, and other relevant facilities;

(5) has received all governmental reviews and approvals required by State or local law, or by the Secretary;

(6) will contribute to good living conditions in the community, and that such community will be characterized by well balanced and diversified land use patterns and will include or be served by adequate public, community, and commercial facilities (including facilities needed for education, health and social services, recreation, and transportation) deemed satisfactory by the Secretary;

(7) makes substantial provision for housing within the means of persons of low and moderate income and that such housing will constitute an appropriate proportion of the community's housing supply; and

(8) will make significant use of advances in design and technology with respect to land utilization, materials and methods of construction, and the provision of community facilities and services.

(b) A new community development program approved for assistance under this part shall be undertaken by a private new community developer or State land development agency approved by the Secretary on the basis of financial, technical, and administrative ability which demonstrates capacity to carry out the program with reasonable assurance of its completion.

After a developer has successfully traversed the application process and accepted an offer of commitment, the terms and conditions under which he must operate are negotiated with HUD and executed in a project agreement. A trust indenture and a development plan are required and must set out (i) all physical, environmental, planning and construction commitments over the 30-year development period, (ii) social goals and special features of the project, (iii) special studies required of the developer with respect to technological innovations and other aspects of the project incapable of resolution prior to execution, and (iv) the pace, scope and detail of the developer's undertakings in terms of 1-year, 3-year and long-term periods. These documents are incorporated into the project agreement and, hence, are enforceable at law. In addition, the developer is required each year to submit a new 1-year and 3-year plan and, if changed conditions warrant substantial alterations, a revised long-term plan. Substantial changes in

any part of the development plan require approval by the Secretary.

The dynamic nature of the project's development process is intended to encourage flexibility in planning and to take advantage of new technology, research and innovation in the design and execution of new community development. A specific provision in the plan, which states that "[t]he developer shall comply with such further reasonable standards for environmental quality control as the Secretary may prescribe after consultation with other federal agencies pursuant to the National Environmental Policy Act of 1969," assures that other federal agencies retain influence over the developer's activities regarding environmental quality after the agreement has been executed. Moreover, another provision extends the developer's commitment to maintain environmental quality control for such additional period of time after completion of development as the Secretary may determine to be appropriate, and HUD states that it will prepare draft and final environmental statements with respect to any subsequent major actions connected with any such project, *i. e.* actions that have significant environmental quality implications.

[4] Plaintiffs contend that the Ranch (1) does not comport with the eight goals of the national urban growth policy announced by Congress;[3] (2) will promote the ten undesirable consequences which Congress found to result from unregulat-

3. (d) The Congress further declares that the national urban growth policy should—

(1) favor patterns of urbanization and economic development and stabilization which offer a range of alternative locations and encourage the wise and balanced use of physical and human resources in metropolitan and urban regions as well as in smaller urban places which have a potential for accelerated growth;

(2) foster the continued economic strength of all parts of the United States, including central cities, suburbs, smaller communities, local neighborhoods, and rural areas;

(3) help reverse trends of migration and physical growth which reinforce disparities among States, regions, and cities;

ed patterns of urban development,[4] and (3) fails to meet the eligibility requirements for federal assistance under the Act. The district court concluded that HUD did not act arbitrarily, capriciously or unlawfully when it found the Ranch to satisfy

(4) treat comprehensively the problems of poverty and employment (including the erosion of tax bases, and the need for better community services and job opportunities) which are associated with disorderly urbanization and rural decline;

(5) develop means to encourage good housing for all Americans without regard to race or creed;

(6) refine the role of the Federal Government in revitalizing existing communities and encouraging planned, large-scale urban and new community development;

(7) strengthen the capacity of general governmental institutions to contribute to balanced urban growth and stabilization; and

(8) facilitate increased coordination in the administration of Federal programs so as to encourage desirable patterns of urban growth and stabilization, the prudent use of natural resources, and the protection of the physical environment.

42 U.S.C. § 4502(d).

4. (b) The Congress further finds that continuation of established patterns of urban development, together with the anticipated increase in population, will result in (1) inefficient and wasteful use of land resources which are of national economic and environmental importance; (2) destruction of irreplaceable natural and recreational resources and increasing pollution of air and water; (3) diminished opportunity for the private homebuilding industry to operate at its highest potential capacity in providing good housing needed to serve the expanding population and to replace substandard housing; (4) costly and inefficient public facilities and services at all levels of government; (5) unduly limited options for many of our people as to where they may live, and the types of housing and environment in which they may live; (6) failure to make the most economic use of present and potential resources of many of the Nation's smaller cities and towns, including those in rural and economically depressed areas, and decreasing employment and business opportunities for their residents; (7) further lessening of employment and business opportunities for the residents of central cities and of the ability of such cities to retain a tax base adequate to support vital services for all their citizens, particularly the poor and disadvantaged; (8) further separation of people within metropolitan areas by income and by race; (9) further increases in the distances between the places where people live and where they work and find recreation; and (10) increased cost and decreased effectiveness of public and private facilities for urban transportation.

42 U.S.C. § 4511(b).

each section 4513 condition for the 18,000,000 dollar federal financing guarantee.[5] None of these district court findings can be characterized on this record as clearly erroneous. Furthermore, the national urban growth policy and the detrimental effects of present patterns which Congress codified operate only as guideposts to inform the Secretary's discretion and judicial review of his substantive decision. Neither creates any judicially enforceable rights.

Urging that HUD made no studies of the Ranch's impact on San Antonio urban problems (transportation facilities, minority and low income distribution, inner city tax base, balanced growth or revitalization of the central city), plaintiffs argue that the Ranch cannot be consistent with comprehensive planning for the entire urban area, as required by section 4513(a)(4) and HUD regulations (since no such plan exists),

5. The findings were:
(1) The project will provide an alternative to disorderly urban growth;
(2) It will be economically feasible, in that it will capture more than 15% of the projected growth of Bexar County, because of its wide range of housing amenities and the superior environment;
(3) It will contribute to the welfare of the entire area, as existing septic tanks will be replaced with storm and sanitary sewers, and as industrial and commercial facilities will be placed in a setting encompassing a broad price range of housing;
(4) It is consistent with comprehensive physical and social planning;
(5) It has received all governmental reviews and approvals required by State or local law;
(6) It will contribute to desirable living conditions in the community, and will be characterized by well balanced and diversified land use patterns, and will include or be served by adequate public, community, and commercial facilities;
(7) It makes substantial provision for housing within the means of persons of low and moderate income;
(8) It will make significant use of advances in design and technology with respect to land utilization, materials and methods of construction, and the provision of community facilities and services; and
(9) A basis of financial, technical, and administrative ability which demonstrates capacity to carry out the program with reasonable assurance of its completion has been shown.
Sierra Club v. Lynn, *supra*, 364 F.Supp. at 839.

and that Bexar County, which must become responsible for governing and servicing the development, was never asked to approve the Ranch, as mandated by section 4513(a)(5).

The administrative record demonstrates that from the beginning HUD conceived of the Ranch as an integral element of the entire San Antonio community. The myriad economic, marketing, environmental and urban studies indicated that the project would provide a viable alternative (preserving and enhancing the existing natural amenities) to the rapid and disorderly urban growth projected for the northwest quadrant of Bexar County, an area devoid of governmental land use regulations or comprehensive water resource management planning. It is anticipated that this growth phenomenon will be exacerbated by the nearby construction of the University of Texas at San Antonio and the South Texas Medical Center. Thus, the orderly development of the Ranch should advance the goals of Title VII by retarding the expected and otherwise inevitable urban sprawl over the aquifer through implementation of a comprehensive land use plan which institutes demanding environmental controls in an ecologically sensitive area as well as by contributing to the welfare of the entire San Antonio community.

HUD evaluated the project's feasibility and its interrelation with the City of San Antonio by examining regional growth trends, population and employment distribution, market potentials, adequacy of regional transportation facilities and the long-term fiscal and economic impact of the Ranch on its adjacent political jurisdictions. These areas of concern were treated in the August 1971 report of the Assistant Secretary of HUD to the Community Development Board of Directors. He examined and the Board approved the Ranch with respect to each requirement of section 4513 and all applicable HUD regulations. To allay fears that the Ranch would counteract efforts to revitalize the downtown area of San Antonio, the developer submitted expert studies to the City Council that indicated a minimally harmful, if not an overall beneficial,

economic impact on the city and its tax base from the project. As a result the City Council rescinded its prior unfavorable position as to the Ranch and in February of 1972 voted to adopt a resolution supporting annexation of the Ranch in the future and to execute an agreement of cooperation with the developer: (a) to institute measures to protect the Edwards reservoir from pollution, (b) to channel all urban-type federal grants through the City, (c) to seek assistance from the developers with the planning, analysis and feasibility studies for a possible Title VII new-town-in-town project in San Antonio, and (d) to provide water, gas, electricity, sewerage and other municipal services to the Ranch under contract with the developer. In responding to comments to the "final" environmental impact statement, HUD stated that it would give full consideration to a new-town-in-town community in San Antonio regardless of the final action it took as to the Ranch.

Not only did both HUD and the developer endeavor to work closely and cooperate fully with state, local and city officials, the record also shows that the Ranch project "is consistent with comprehensive planning . . . determined by the Secretary to provide an adequate basis for evaluating the new community development program in relation to other [state, local and private] plans and activities . . .," 42 U.S.C. § 4513(a)(4), and "has received all governmental reviews and approvals required by State or local law, or by the Secretary," 42 U.S.C. § 4513(a)(5).

At the project's inception, no governmental entity exercised planning authority over the proposed site. "[N]either governmental controls over land use nor comprehensive and cohesive water resource management plans then existed in this area of Bexar County." Sierra Club v. Lynn, *supra*, 364 F.Supp. at 839. Bexar County, which was the only governmental body with jurisdiction over the entire ranch, had only residential subdivision regulations. Consequently, HUD selected the Alamo Area Council of Governments to conduct a review of the Ranch in compliance with the Office of Management and Budget Circular A-95, which in general requires that an applicant for Title VII assistance notify the appropriate clearing house for the area in which the project is located of its intent to apply for such assistance in order to afford the clearing house and other interested local agencies an opportunity to comment on the proposed project. The district court determined that "the Alamo Area Council of Governments . . ., the Water Board of the City of San Antonio, the City of San Antonio Public Service Board, the Texas Water Quality Board, the Governor's office, and the Northside Independent School District had reviewed the project and decided that [the Ranch] was consistent with the comprehensive regional plan." 364 F.Supp. at 839.

Title VII does not state that the existence of a comprehensive regional land use plan is a condition precedent to federal assistance or that if no such plan is in effect, the Secretary must exercise his statutory authority to make comprehensive planning grants available to official governmental planning agencies where rapid urbanization is expected to occur on property to be developed as a new community, *see* 40 U.S.C. § 461. In this vein, draft HUD regulations provide that "the area within which a new community is to be situated must be covered by a comprehensive areawide plan *or by ongoing planning promulgated or carried on by a duly authorized agency*." Proposed HUD Reg. § 32.7(f), 36 Fed.Reg. 14208 (1971) (emphasis added). These regulations also state that the comprehensive planning for the area must, in the secretary's judgment, be sufficiently detailed to provide a reasonable basis for evaluating the relationship of the proposed new community to other state, local and private plans and activities and that in those areas with a regional planning agency certified by the secretary, consistency must be found between the new community and the planning conducted by such agencies.

Plaintiffs do not assert that the Alamo Area Council was improperly certified by HUD or defaulted in its A-95 and regional planning responsibilities. There is no evidence that the council (among whose 16 members were representatives from plaintiff-intervenors, Edwards Underground Water District and Bexar County) inadequately discharged its planning and reviewing functions or erroneously determined that the Ranch was a viable project. Its conclusions were independently corroborated by various other local governmental agencies and were approved by the district court. Finally, that no official endorsement of the Ranch by Bexar County is required by state law is verified by a letter to HUD approving the Ranch from Bexar County Commissioners Court Judge Blair Reeves, who stated that though the county had no planning or zoning responsibility under existing state law, he found the project to be consistent with the San Antonio metropolitan area goals. This point was mooted in April of 1974 when the City Council of San Antonio voted to extend the city's extra-territorial jurisdiction over the Ranch from 58% to 100% of the proposed site.

The record before us does not support the claim that HUD failed to consider all relevant Title VII factors in reaching its decision or that the decision itself manifests a clear error in judgment. The legislative history of Title VII and HUD regulations thereunder clearly contemplate federal assistance for "free standing and self-sufficient new communities away from existing urban centers where there is a clear showing of economic feasibility, primarily . . . to accommodate [expected] population growth," as well as for new communities in metropolitan areas that are designed to combat urban sprawl and to renew deteriorating central cities. *See* proposed HUD Reg. § 32.7(a), 36 Fed.Reg. 14207 (1971). We hold that Secretary Lynn acted neither arbitrarily nor capriciously, nor failed to act in accordance with law when he determined to grant the developers of the Ranch federal assistance under the Urban Growth and New Community Development Act.

II.

National Environmental Policy Act of 1969

[5] NEPA was enacted to promote a national policy of "productive and enjoyable harmony between man and his environment," 42 U.S.C. § 4321, by demanding attention to environmental values and instituting an implementing methodology which would assure that these values were incorporated in agency planning and decision making processes. Because HUD's commitment to guarantee 18,000,000 dollars in bond obligations for the Ranch constituted a major federal action "significantly affecting the quality of the human environment," that decision became subject to the "full disclosure" provisions of NEPA, 42 U.S.C. § 4332(2)(C). As a result HUD filed three environmental impact statements—a draft statement on September 13, 1971, a final statement on January 20, 1972, and an addendum to the final statement on August 24, 1972.

The district court concluded that the final statement, as supplemented by the addendum, "though possibly not completely exhaustive in every respect, is sufficient to permit a reasoned decision as to the environmental effects of [the Ranch]" and "meets all the requirements for the 'detailed statement' required by NEPA . . . ." 364 F.Supp. at 842. Furthermore, the court determined that the Secretary's substantive commitment decision was neither arbitrary nor capricious nor an abuse of discretion since "HUD has complied with the goal of NEPA, . . . by '[using] all practicable means, consistent with other essential considerations of national policy' to carry out our nation's environmental policy." 364 F.Supp. at 844.

Plaintiffs attack these findings, contending that (1) the agency's offer of commitment to the developer was in violation of HUD regulations and Council on Environmental Quality guidelines since it was extended before the thirty-day period for circulation of the impact statement for public comment had expired; (2) the final statement and addendum

are unacceptable because both were improperly delegated to and represent the work product of the developer and his experts with little independent analysis or input from HUD and because the offer of commitment was not withdrawn pending completion of the additional environmental studies; (3) the supplemented final statement does not measure up to the requirements of NEPA; and (4) HUD's decision of commitment is arbitrary and capricious since it gave insufficient weight and consideration to environmental factors. In related contentions, plaintiffs assert that HUD's treatment of alternatives to the proposed project in the statement was deficient and that in accordance with the Urban Growth and New Community Development Act, HUD was obligated to consider and develop the suitability of alternative sites for the project.

To support their first issue—procedural irregularities at the agency vitiated HUD's offer of commitment—plaintiffs point to an October 1971 decision by the Community Development Board of Directors "to authorize an offer of commitment at the earliest appropriate time" and to a "draft" offer of commitment allegedly communicated from HUD to the developer on February 15, 1972, a date well before expiration of the thirty-day statement circulation period required by guidelines of the Environmental Protection Agency, 40 C.F.R. § 6.15 (1973), the Council on Environmental Quality, 40 C.F.R. § 1500.11(b), 38 Fed.Reg. 20556 (1973), and HUD regulations, HUD Handbook 1390.1(5.)(d.)(2), 38 Fed.Reg. 19187 (1973). Furthermore, plaintiffs argue that since the final statement, dated and filed with the Council on Environmental Quality on January 20, was not received until three days later, the February 23 offer of commitment also preceded expiration of the circulation period.

[6] The short answer is that the Council on Environmental Quality guidelines, although highly persuasive, do not govern compliance with NEPA. Sierra Club v. Callaway, *supra*; Hiram Clarke Civic Club, Inc. v. Lynn, 476 F.2d 421 (5th Cir. 1973). The draft HUD Title VII Regulations, which have never been formally adopted, were uppermost in the minds of the Community Development Board of Directors at their February 15 meeting when they authorized Assistant Secretary Jackson "to determine at the expiration of the thirty-day period whether an offer of commitment should be issued . . . . ." More importantly, the record is clear that the February 23 offer of commitment followed the circulation of the impact statement to the Council on Environmental Quality and other public agencies and groups by more than the specified thirty days. Finally, that conditional offer was lawfully issued pursuant to 42 U.S.C. §§ 4513, 4514, and draft HUD regulations. Proposed HUD Reg. § 32.23, 36 Fed.Reg. 14212–13 (1971).

[7, 8] Neither is the commitment offer or the impact statement fatally undermined by the direct participation of the developer and his experts in the underlying environmental and other studies. There is no NEPA prohibition against a state agency, financially interested private contractor or a new community applicant providing the federal agency, which must of necessity work closely with these parties, data, information, reports, groundwork environmental studies or other assistance in the preparation of an environmental impact statement. *See* Iowa Citizens for Environmental Quality, Inc. v. Volpe, 487 F.2d 849 (8th Cir. 1973); Citizens Environmental Council v. Volpe, 484 F.2d 870 (10th Cir. 1973), cert. denied, —— U.S. ——, 94 S.Ct. 1935, 40 L.Ed.2d 286 (1974). NEPA demands only that "the applicable federal agency must bear the responsibility for the ultimate work product designed to satisfy the requirement of § 102(2)(C)." Life of the Land v. Brinegar, 485 F.2d 460, 467 (9th Cir. 1973), cert. denied, —— U.S. ——, 94 S.Ct. 1979, 40 L.Ed.2d 312 (1974). NEPA's commands, however, do not permit the responsible federal agency to abdicate its statutory duties by reflexively rubber stamping a statement prepared by others. The agency must independently perform its reviewing, analytical and judgmen-

tal functions and participate actively and significantly in the preparation and drafting process. *See* Greene County Planning Board v. F.P.C., 455 F.2d 412 (2d Cir.), cert. denied, 409 U.S. 849, 93 S.Ct. 56, 34 L.Ed.2d 90 (1972). HUD did no less here.

Non-degradation of the aquifer and ranch environment were paramount considerations throughout the entire HUD review of the Ranch application. To this end an inter-disciplinary team of New Communities Development staff members prepared and compiled each of the three environmental statements after independently reviewing data, information and comments provided by the developer's experts and other interested public agencies and groups. To obtain further verification, HUD retained a geologist and his staff of three associates to supervise and analyze the supplemental environmental studies and review every aspect of the project, especially the water quality monitoring program and the proposed environmental controls. His report and favorable conclusions were included with those studies in the addendum prepared by the New Communities Development staff.

[9–11] In the absence of bad faith or misplaced reliance, an agency faced with numerous applications for assistance and endowed with finite internal resources to implement congressional policy, cannot be expected to ignore useful and relevant information merely because it emanates from an applicant. This does not mean it may substitute the applicant's efforts and analysis for its own. The guidelines of the Council on Environmental Quality and the Environmental Protection Agency regulations regarding preparation of impact statements clearly contemplate submission of initial environmental information by the applicant to the agency. *See* EPA Reg., 40 C.F.R. § 6.21(c) (1973); CEQ Guidelines, 40 C.F.R. § 1500.7(c), 38 Fed.Reg. 20553 (1973); *see also* HUD Handbook 1390.1(5.), 38 Fed.Reg. 19184–87 (1973). In view of HUD's active participation and independent preparation of the impact statement and addendum, the district court did not

err when it failed to conclude that the agency improperly delegated its statutory responsibilities to the developer.

Whenever an agency decision to act precedes issuance of its impact statement, the danger arises that consideration of environmental factors will be *pro forma* and that the statement will represent a *post hoc* rationalization of that decision. NEPA was intended to incorporate environmental factors and variables into the decisional calculus at each stage of the process. "This means that draft statements on administrative actions should be prepared and circulated for comment prior to the first significant point of decision in the agency review process." CEQ Guidelines, 40 C.F.R. § 1500.7(a), 38 Fed.Reg. 20552 (1973). The impact statement is the central, independent component of NEPA's decision-making methodology since it "provides a basis for (a) an evaluation of the benefits of the proposed project in light of its environmental risks, and (b) comparison of the net balance for the proposed project with the environmental risks presented by alternative courses of action." Natural Resources Defense Council, Inc. v. Morton, 148 U.S.App.D.C. 5, 458 F.2d 827, 833 (1972).

[12, 13] In this case, HUD's draft statement preceded its first significant decision, the October 1971 authorization by the Community Development Board of Directors of an offer of commitment at the earliest appropriate time. However, that the draft and final statement were totally inadequate under NEPA is signaled by HUD's conditioning its offer on a comprehensive study of the recharge zone and on Community Development and Texas Water Quality Board approval of the measures to be instituted to protect the aquifer. The "final" impact statement itself acknowledged the lack of knowledge regarding the effect on the aquifer of storm water run-off, which it identified as the major pollution threat, and called for further investigation before, during and after construction of the Ranch. Because the district court's order holding this litigation in abeyance and the developer's agreement to Hud's call for a moratorium on construction effectively maintained

the status quo pending completion of the August addendum, it was not incumbent on the court below to require that HUD withdraw its commitment. The offer was contingent, stating that the Community Development Board "is under no obligation to enter into a project agreement or to guarantee your debt obligation until and unless" the Board has affirmatively found that each specified condition has been met. Post-submission efforts to rehabilitate the statement to comport with NEPA's provisions or to minimize adverse environmental consequences and maximize benefits should not be barred by initial inadequacies. The goal of NEPA is a better environment. While formally correct statements and technical compliance with the Act and complimentary guidelines are required, an initial finding of section 102 noncompliance must not irrevocably preclude eventual compliance. HUD's compliance with NEPA must be measured by the contents of the final impact statement as supplemented by the later addendum.

[14] As a further point in their multifaceted appellate offensive, plaintiffs contend that the supplemented statement did not comply with section 102(2)(C) because it failed (1) to examine the secondary or indirect environmental impacts from expected neighboring "parasite" developments; (2) to set out a cost-benefit analysis of the project; (3) to consider cumulative impacts; (4) to discuss adequately the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity; and (5) to treat fully outside comments and opinions. A cursory examination of the impact statement, addendum and supporting documents demonstrates each of these assertions' lack of substance.

The supplemented statement pointed to statistics indicating continued explosive population growth in the northwest quadrant of Bexar County and the probabilities that the influx of unregulated, low density subdivisions would be accelerated by the expanded network of regional highways and that the

Ranch would tend to attract parasite settlements by as many as 40,000 persons along its outskirts. The statement also warned of the concomitant need for appropriate land use and zoning controls to protect the aquifer from accompanying septic tank discharge and other pollution and to insure that such developments were consistent with the plan, patterns and controls established for the Ranch. The developer promised to cooperate with the Alamo Area Council, the City of San Antonio and the Texas Water Quality Board in establishing the necessary regulatory controls. Moreover, in responding to the district court's order requiring the Edwards Water District and Texas Water Quality Board to file with the court semi-annual reports as to development over the aquifer, its effect and the environmental control measures being implemented, the Water Board indicated that it intended to incorporate virtually all of the HUD requirements imposed on the Ranch into an order regulating all development activities over the aquifer.

[15, 16] Similarly, exhibits in the addendum disclosed the expected cumulative impact of the Ranch on population distribution, land use patterns and the financial and economic resources of Bexar County and the surrounding areas. Unavoidable adverse environmental effects, irretrievable commitments of resources and other environmental costs and risks were identified and found not to outweigh the benefits of the Ranch in protecting and enhancing the Ranch site as well as avoiding the onset of urban sprawl. That the factors in this cost-benefit analysis are generally imprecise and unquantifiable does not render the result inadequately detailed. NEPA does not demand that every federal decision be verified by reduction to mathematical absolutes for insertion into a precise formula. Land use regulation over the aquifer was seen to advance its long-run productivity as against the adverse short- and long-term effects of uncontrolled development. Advance planning, careful monitoring of water quality and stringent environmental controls should assure the continued in-

tegrity of the aquifer if such measures are extended throughout the recharge zone. Finally, all comments received as to each statement during the circulation period were attached and included in the supporting documentation. Many of the responses to the draft statement and HUD's replies thereto are reflected in the two succeeding statements.

"NEPA requires that an agency must—to the *fullest* extent possible under its other statutory obligations—consider alternatives to its action which would reduce environmental damage." Calvert Cliffs' Coordinating Committee v. AEC, 146 U.S.App.D.C. 33, 449 F.2d 1109, 1128 (1971). In its discussion of alternatives, HUD proposed (a) taking no action, (b) requiring actions of a substantially different nature that would provide similar benefits with varying environmental impacts and (c) approving a project of different size, scope or design with less significant environmental impacts. The no action alternative was unattractive since anticipated uncontrolled development over the recharge zone posed a greater threat to the aquifer. Just as adverse impacts could not be avoided by refusing financial assistance to the Ranch, neither could they be precluded by delaying the project 3 to 5 years until proposed but unenacted state or federal land use legislation might result in a comprehensive plan for the recharge zone. The second alternative encompassed approving the project on a site off the recharge zone. This proposal was discarded because it would produce the same adverse environmental results as no action and would not satisfy the demand for housing in the northwest quadrant of Bexar County. Approval of a project smaller in scope or of less costly design on the Ranch site under the third alternative would not provide the housing necessary to accommodate most of the area's potential residents. Neither would it incorporate the economies of planning and funding to be found in a larger project nor exert such a beneficial influence on the surrounding area.

Asserting that HUD's discussion of alternatives is conclusory, superficial and self-serving, plaintiffs contend that the

impact statement is fatally deficient because it fails to mention the acquisition of the recharge zone as a park or game preserve, the modification or elimination of federal assistance programs so as to discourage development over the recharge zone, the development of a different type or design of new community in another area of Bexar County, or any consideration or development of alternative sites for the project off environmentally sensitive areas. In a related contention, plaintiffs argue that Title VII, which is a guidepost for application of NEPA in this urban-suburban setting, compels HUD to consider alternative locations for new communities in evaluating an application for Title VII assistance.

[17, 18] It is true that the scope and extent of HUD's treatment of alternatives was less than exhaustive. Its sufficiency under NEPA, however, must be judged in light of the nature of the federal action and the underlying implementing federal legislation. The agency must consider appropriate alternatives which may be outside its jurisdiction or control, and not limit its attention to just those it can provide, *see* Natural Resources Defense Council, Inc. v. Morton, *supra*. Nevertheless, compliance with the NEPA command that an agency "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources," 42 U.S.C. § 4332(2)(D), must be judged against a rule of reason. "There is no need for an [impact statement] to consider an alternative whose effect cannot be reasonably ascertained, and whose implementation is deemed remote and speculative." Life of the Land v. Brinegar, *supra*, 485 F.2d at 472.

[19, 20] In this light the statement cannot be condemned for its failure to discuss either the acquisition of the recharge zone as a park at a prohibitive cost, or the elimination of all federal assistance to any development over the recharge zone. Furthermore, HUD's Title VII responsibility is limited to

approving or disapproving, in accordance with the statute's provisions, new community applications. Although the Act permits HUD upon specific authorization of the President "to plan and carry out large-scale projects" on federally owned lands to demonstrate the development of and serve as models for new communities, 42 U.S.C. § 4524, this statutory authority does not obligate the agency to search out a competing applicant willing to develop and finance a project on an alternate site or to work up a counter-proposal of its own before it can pass on the merits of a properly submitted new community application. "There can be no merit to plaintiff's claim that HUD cannot approve an otherwise eligible project merely because they have discovered vacant land in an area that they believe may be better suited for a new community than the existing site." Sierra Club v. Lynn, *supra*, 364 F.Supp. at 839.

[21] None of the alternative sites in Bexar County suggested by the plaintiff met all the eligibility requirements of Title VII. Absent a competing applicant, HUD's prerogatives ultimately consisted of accepting or rejecting the application before it. The impact statement explored the consequences of both courses of action. If HUD is to discharge fully its Title VII and NEPA duties, it must also review the available alternatives in planning, design and placement of a new community. The impact statement adequately discussed these aspects of the Ranch. When the statement is read with its supporting documentation, it furnishes sufficient information "to permit a reasoned choice of alternatives so far as environmental aspects are concerned." Natural Resources Defense Council, Inc. v. Morton, *supra*, 458 F.2d at 836. Since the statement was not deficient in approach and reflected a basis in good faith objectivity, we hold that it fully complied with NEPA.

[22] Finally, plaintiffs assert that the Secretary's substantive decision to approve federal assistance to the developers of

the Ranch gave insufficient weight to the environmental risks inherent in constructing a city of 88,000 persons over an area supplying water to more than 1,000,000 residents. The environmental studies indicated that domestic sewage, solid waste, accidental spills of dangerous liquids and storm water run-off posed the greatest threats to the integrity of the aquifer. The district court summarized well the pervasive measures required by HUD to protect the water quality of the underground reservoir. It suffices to refer the interested reader to that cogent exposition with the observation that the precautions taken clearly supported the court's determination of their adequacy. Sierra Club v. Lynn, *supra*, 364 F.Supp. at 843.

Should it be discovered that pollutants have escaped the surface controls and threaten the aquifer, the developer must take remedial action, including installing an impervious lining in drainage channels over the 161 acres of land identified as especially porous. Any remedial action is subject to HUD and Texas Water Quality Board approval. The project agreement makes it the developer's legally enforceable duty to comply with all present and future environmental quality standards. The developer has agreed to undertake measures to minimize soil erosion and control of sediment and water run-off during the construction phases. To effectuate its duty of quality control and inspection of public improvement construction projects, the developer in conjunction with the City of San Antonio, the Texas Water Quality Board and the Texas State Department of Health has agreed to create an environmental committee, an architectural review board and to employ an independent inspection agent, whose reports will be available to all public and other regulatory agencies. We view the efforts expended to protect the aquifer as substantial and apparently efficacious. The Secretary's decision was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

III.

Water Pollution Prevention and Control Act Amendments of 1972

Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Pub.L. No. 92–500, 86 Stat. 816, 33 U.S.C. § 1251 et seq., in order "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To this end the administrator of the Environmental Protection Agency is directed, in cooperation with other federal, state and local agencies, to "prepare or develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters and ground waters and improving the sanitary condition of surface and underground waters. In the development of such comprehensive programs due regard shall be given to the improvements which are necessary to conserve . . . the withdrawal of such waters for public water supply, agricultural, industrial, and other purposes." 33 U.S.C. § 1252(a). The Act provides for federal and state enforcement of effluent limitations to be prescribed and of a discharge permit system. 32 U.S.C. § 1319. Unless in compliance with the provisions of the Act, "the discharge of any pollutants by any person shall be unlawful." 33 U.S.C. § 1311.

The district court concluded that plaintiffs had failed to state a claim under the Water Pollution Control Act because (1) this record does not reflect that the Environmental Protection Agency had established any water quality standards for the court to enforce, and (2) the scheme of environmental controls imposed should prevent any Ranch polluted water from reaching the aquifer. In this court, arguing from the dual premises that the Act establishes a federal policy of nondegradation of the Nation's surface and ground water supplies and that either the Ranch or the "parasite" developments it will attract in adjacent areas will inevitably result in the degradation of the aquifer, plaintiffs contend that HUD's loan commitment violates the duty imposed on the agency by

33 U.S.C. § 1368(c). This section provides in pertinent part that "[i]n order to implement the purposes and policies of this chapter to protect and enhance the quality of the Nation's water, the President shall . . . cause to be issued an order (1) requiring each Federal agency authorized to enter into contracts and each Federal agency which is empowered to extend Federal assistance by way of grant, loan, or contract to effectuate the purpose and policy of this chapter in such contracting or assistance activities. . . ." In Executive Order No. 11738, 38 Fed.Reg. 161 (1973), the President subsequently mandated that "each Federal agency empowered to extend Federal assistance by way of grant, loan or contract shall undertake such procurement and assistance activities in a manner that will result in effective enforcement of the Clean Air Act and the Federal Water Pollution Control Act. . . ."

[23] In the absence of evidence that the Ranch will pollute the aquifer and degrade established standards of water quality or that HUD's loan commitment contravened its duty to effectuate the Federal Water Pollution Control Act, we affirm the district court's determination that plaintiffs have failed to state a claim for violation of that Act. As the court below stated, the record is silent as to standards of water quality for the aquifer prescribed by the Environmental Protection Agency. It is undisputed that the developer must meet any state or federal water standards that may be established in the future. More importantly, the developer must act to prevent the Ranch from degrading the existing water quality in the aquifer. If the Ranch is discovered to be polluting the underground water supply, the developer has the legally enforceable duty to remedy the situation.

IV.

Attorneys' Fees

Convinced that this litigation, instituted by the plaintiffs as "private attorney generals," had advanced the public interest

by ensuring that adequate precautions would be taken to protect the aquifer and by effectuating important congressional policy, the district court awarded plaintiffs 20,000 dollars in attorneys' fees, costs and expenses. Only the developers were cast in judgment for this award since HUD and Secretary Lynn were immunized by statute. *See* 28 U.S.C. § 2412. Plaintiffs appeal from the award as inadequate. The developer cross-appeals from the award as improperly assessed against it. We reverse on the cross-appeal.

"The so-called 'American Rule' governing the award of attorneys' fees in the federal courts is that 'attorneys' fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor.' Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717, 87 S.Ct. 1404, 1407, 18 L.Ed.2d 475 (1967)." F. D. Rich Co., Inc. v. United States, Industrial Lumber Co., Inc., — U.S. —, —, 94 S.Ct. 2157, 2163, 40 L.Ed.2d 703 (1974). Plaintiffs recognize that neither NEPA nor Title VII provide for the recovery of attorneys' fees. They had no contractual agreement with HUD or the developer concerning attorneys' fees.

The "American Rule" has not served, however, as an absolute bar to the shifting of attorneys' fees even in the absence of statute or contract. The federal judiciary has recognized several exceptions to the general principle that each party should bear the costs of its own legal representation. We have long recognized that attorneys' fees may be awarded to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, or where a successful litigant has conferred a substantial benefit on a class of persons and the court's shifting of fees operates to spread the cost proportionately among the members of the benefitted class. The lower courts have also applied a rationale for fee shifting based on the premise that the expense of litigation may often be a formidable if not insurmountable obstacle to the private litigation necessary to enforce important public policies.

F. D. Rich Co., Inc. v. United States, Industrial Lumber Co., Inc., *supra*, — U.S. at —, 94 S.Ct. at 2165 (footnotes omitted).

The power to award attorneys' fees in the absence of statutory or contractual authorization is rooted in the inherent power of a federal court to do equity in the face of "overriding considerations." *See* Hall v. Cole, 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973). Clearly, no such considerations within the ambit of the first two exceptions to the American Rule exist in this case. It would be improper to punish the developer or HUD, either as unsuccessful litigants, or for bad faith, vexatious or obdurate conduct in their defense of the action. Inapplicable also is the "common fund" or "common benefit" exception, which is founded on the unjust enrichment rationale that the entire class benefited by a plaintiff's efforts should share the cost of litigation. It shifts to the beneficiaries those costs that they would have incurred had they brought and prosecuted the suit. *See* Hall v. Cole, *supra*; Mills v. Electric Auto-Lite Co., 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970). None of the benefits of this litigation cited by the district court have inured, except in the abstract, to the developer. The common benefit rationale could justify an award against a public agency or private entity which would be able to shift the costs in common to the members of the public who draw their water from the Edwards Aquifer. Clearly, the developer is not in a position to distribute the costs of this litigation to the one million residents of the San Antonio area who will benefit from the preservation of this water source.

The present case is almost identical to The Wilderness Society v. Morton, 495 F.2d 1026 (D.C. Cir. 1974), petition for cert. filed, 411 U.S. 917, 93 S.Ct. 1550, 36 L.Ed.2d 309 (1974). There the District of Columbia Circuit invoked the third exception to the American Rule to award attorneys' fees to plaintiff citizen groups who had acted as private attorney generals in litigation which, while not obtaining the ultimate

relief sought, did act as a catalyst to effect a change that served the public interest. The litigation had blocked construction of the Trans-Alaska Pipeline until Congress subsequently enacted specific legislation permitting construction. One-half of the plaintiffs' attorneys' fees were assessed against Alyeska Pipeline Service Co., the private applicant under the Mineral Leasing Act, despite the fact that it was the Interior Department which had violated the Act and failed to comply with NEPA. The court reasoned that since "Alyeska unquestionably was a major and real party at interest in this case, actively participating in the litigation along with the Government, we think it fair that it should bear part of the attorneys' fees." 495 F.2d at 1036 (citation omitted). The fees were arbitrarily halved and Alyeska was assessed one half. Since collection from the government was barred by statute, plaintiffs were required to absorb the other half. While Alyeska's participation in litigation that would have been finally adjudged improper but for congressional intervention might be cited as a distinguishing feature, the basic thrust of the majority position in the D. C. Circuit supports the action taken by the court below.

[24] We decline to follow *The Wilderness Society*. This circuit has never assessed attorneys' fees against a party innocent of any wrongdoing.[6] In the absence of proof that the private party controlled the government agency's actions or caused its default, it cannot be cast in judgment as a result of the agency's shortcomings. The fact that the breach of duty involved was committed by one who is immune from liability for financial redress affords no basis for a shifting of fees.

[25] It would be inequitable to assess attorneys' fees against the private developer in this case. Granting that plaintiffs performed a valuable public service in bringing this

6. Cooper v. Allen, 467 F.2d 836 (5th Cir. 1972); 493 F.2d 765 (5th Cir. 1974) and Lee v. Southern Home Sites Corp., 429 F.2d 290 (5th Cir. 1970), relied upon by the district court, are not to the contrary.

action which directly caused HUD's full compliance with NEPA on the Ranch project, it cannot be gainsaid that HUD was the only party that had breached a duty.[7] Congress directed the environmental obligations of NEPA against federal agencies alone. HUD was solely responsible for the initially deficient impact statement. The developer successfully defended this lawsuit. Its defense was not shown to have been unreasonable or to have unduly protracted this litigation. The district court was incorrect in proceeding from the premise that "attorneys' fees should be awarded unless the trial court can articulate specific reasons for a denial." 364 F.Supp. at 848.

The result of governmental immunity in this case is to require plaintiffs to absorb their own legal expenses. Another solution for future cases must come from Congress rather than in whole or half from the pocket of an innocent party.

V.

Retention of Jurisdiction

In entering judgment for the defendants, the district court retained jurisdiction over this action for the purpose of ensuring future compliance with the safeguards imposed on the Ranch's development; monitoring the development of areas adjacent to the Ranch and new measures which may be taken to protect the recharge zone; and acting as a central depository and public information source for all future written materials relating to compliance with HUD's requirements. The Texas Water Quality Board and the Edwards Underground Water District were ordered to file semi-annual reports on the extent and effect of development over the recharge zone and the measures instituted for protection of the aquifer, as well as the status of legislation, proposals and plans to protect remaining portions of the recharge zone outside Bexar Coun-

7. Because plaintiffs were unsuccessful in their other claims of statutory violations, only NEPA compliance is pertinent.

ty. 364 F.Supp. at 846. We find no constitutional basis to support this continued exercise of federal judicial power.

[26] Federal courts are empowered under Article III of the Constitution to rule only upon an actual "case or controversy." *See, e. g.*, Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969); Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617 (1937). With the rendition of a definitive judgment for defendants on the merits of each of plaintiffs' claims, affirmed by this court, the litigable aspects of the dispute are at an end unless further appellate proceedings are undertaken. The issues capable of judicial determination have been resolved; the rights and duties of the parties have been adjudicated.

[27, 28] The district court must abjure the role of a quasi-administrative agency for environmental affairs in Bexar and other affected counties. No evidence whatsoever indicates that HUD will fail to discharge faithfully its statutory functions. *See* SEC v. Medical Committee for Human Rights, 404 U.S. 403, 92 S.Ct. 577, 30 L.Ed.2d 560 (1972). No analogy properly can be drawn here to civil rights or school cases in which the litigation proceeded against a background of a long history of purposefully unlawful conduct. *See, e. g.*, Alexander v. Holmes County Board of Education, 396 U.S. 19, 90 S.Ct. 29, 24 L.Ed.2d 19 (1969). If any defendant should be asserted to be acting in breach of its duties under HUD's commitment or the law, the present plaintiffs or others who may be affected are free to file another action based upon such asserted malfeasance. Of course, the judgment and grant of relief disposing of the litigation, could have compelled the parties to file in a convenient local public office such reports as they may in the future make that contain material of public interest. The court may so modify its judgment upon remand.

[29] However, although "[m]ere voluntary cessation of allegedly illegal conduct does not moot a case . . . ," United States v. Concentrated Export Assn., Inc., 393 U.S. 199, 203, 89 S.Ct. 361, 364, 21 L.Ed.2d 344 (1968), federal jurisdiction must be founded upon at least a "mere possibility [of recurrence] which serves to keep the case alive." United States v. W. T. Grant Co., 345 U.S. 629, 633, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953). The record here discloses only the most speculative of possibilities that plaintiffs will find it necessary in the future to invoke judicial guidance of HUD's activities. As of today they can demonstrate no legal injury sufficient to present an actual case or controversy. *See* Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). There no longer remains any unadjudicated claim upon which relief can be granted. *See* Jicarilla Apache Tribe of Indians v. Morton, 471 F.2d 1275 (9th Cir. 1973). "A hypothetical threat, based on speculative facts, is not enough to support the jurisdiction of a Federal Court." Alabama ex rel. Baxley v. Woody, 473 F.2d 10, 14 (5th Cir. 1973). In sum, we find on this record no jurisdiction to retain jurisdiction.

VI.

Conclusion

The judgment appealed from is affirmed except as to the award of attorneys' fees and the retention of jurisdiction. The cause is remanded for the entry of an order not inconsistent with this opinion.

Affirmed in part, reversed in part, and remanded.

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